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"A TAX LAW PERSPECTIVE ON BREXIT: WHICH CONSEQUENCES ON VAT AND CUSTOMS PROCEDURES?"

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Introduction

The European Union is a supranational organisation, a political and economic union whose formation and current structure is the result of an intense and long process of integration, development and cooperation that began in 1951, when six European countries decided to sign the Treaty establishing the European Coal and Steel Community.

From this treaty onwards, there have of course been many others over the years, such as the 1957 Treaty of Rome, the 1992 Treaty of Maastricht or the 2007 Treaty of Lisbon, which have undoubtedly contributed to affirming and consolidating the identity of the EU, to defining its competences and the competences of its institutions and also to expanding the benefits, rights and freedoms that the EU itself guarantees to its citizens.

By virtue of this strong development and increasingly intense integration that has taken place over the years, the number of Member States has gradually grown from six, the number of founding States, to the current twenty-seven Member States that are part of the European Union.

As mentioned, the number of Member States has therefore always been increasing, except in one single case, i.e., there has only been one case in the history of the EU where a European country decided to withdraw and leave the Union, after having joined it in 1973.

As is well known, this is the case of the United Kingdom which decided, following a referendum held in June 2016, to trigger the clause contained in Article 50 of the Treaty on European Union according to which "*Any Member State may decide to withdraw from the Union in accordance with its own constitutional requirements*".

As of today, the exit of the United Kingdom from the EU, which is commonly referred to as "Brexit", has officially been finalised, precisely on 1st January 2021, and the United Kingdom has therefore lost its status as a Member State thus becoming a third country vis-à-vis the EU.

That said, the focus of this paper will be precisely on Brexit and the disruptive effects it has had, and still has, on EU and UK businesses.

Brexit, in fact, being an extremely recent and unprecedented event, has been and still is a source of significant uncertainty for companies, and it is precisely the intention to reduce this uncertainty and provide a clearer framework that has inspired the elaboration of this thesis.

With reference to the above-mentioned uncertainties caused by Brexit, many have in particular been driven by the changes that have occurred in two aspects, namely VAT and customs.

The VAT regulations governing the exchange of goods and the supply of services between the UK and the EU have in fact undergone drastic changes following Brexit, causing, as mentioned, uncertainty and complexity for businesses, and the same can be said with regard to customs

matters, as new customs procedures and formalities have become mandatory for UK businesses trading with the EU, and vice versa, following Brexit.
That being said, the main objective of this work is therefore to specifically investigate and deepen the implications and the changes that VAT and customs procedures have undergone as a result of Brexit, also determining whether or not these changes have contributed to increased complexity more on the part of EU traders or UK traders.
In order to carry out this analysis, the work is structured in three chapters.
The first chapter will first introduce the reasons that led the UK to take this drastic decision to leave and withdraw from the EU, after joining it in 1973.
As will be seen, the relationship between the UK and the EU was never, from the outset, harmonious and several times soured due, above all, to the UK's desire to always maintain a certain degree of sovereignty and autonomy vis-à-vis the EU.
After this introduction, which traces the events and stages that affected and contributed to the UK's decision to leave the EU, the chapter will continue with an analysis of the legislative transition that took place in the UK as a result of Brexit.
Indeed, a State, should it decide to leave the EU, will no longer be bound by European law and its sources, meaning that they cease to have applicability and legal force in the withdrawing State, which, in this case, is the UK.
It therefore becomes necessary for this State, as previously mentioned, to carefully structure a legislative transition whose main objective is to determine how to replace EU law, avoiding a massive lack of regulation.
To this end, in order to facilitate such a transition, the UK has found a solution with the introduction of a new category of domestic law, namely 'retained EU law', which will be extensively discussed in the chapter.
In addition to presenting the characteristics and complexities of this legislative transition following Brexit, the first chapter will also present the two agreements, namely the Withdrawal Agreement and the Trade and Cooperation Agreement, signed by the UK and the EU.
The main provisions contained in these two treaties, their purposes, and any critical points impacting the goodness of the treaties themselves will therefore be outlined.
In the second chapter, the focus will be placed on VAT and specifically, as mentioned above, on the changes that have arisen as a result of Brexit to the VAT rules governing the exchange of goods and the supply of services between the EU and the UK.
In particular, after a brief introduction tracing the origin and introduction of VAT in the EU, the VAT legislation in force in the UK pre-Brexit, i.e., when the UK was still a Member State, will be presented.

Reference will therefore be made to the provisions of the EU Council Directive 2006/112/EC, as this piece of EU legislation laid down the VAT rules regulating trade in goods and services between the UK and other Member States during the UK's membership of the EU.
Subsequently, the changes that these rules have undergone as a result of Brexit will be presented and, to this end, first the changes affecting the exchange of goods will be analysed, and then the changes affecting the supply of services between the UK and the EU will be explored.
That said, the special case of Northern Ireland will also be analysed in depth in the chapter, and to this end reference will be made to the Protocol on Northern Ireland contained in the Withdrawal Agreement.
As will be seen, in fact, Northern Ireland represents a special case in that the same VAT rules that apply in the rest of the UK for trade with the EU do not find application.
The last part of the chapter will be focused on assessing the consequences that Brexit has had on the procedures by which a business established in the UK can register for VAT purposes in the EU.
The dissertation will then proceed with an in-depth examination and review of the complexities and new obligations that have arisen in customs matters for UK and EU traders, and this will be the subject of the third chapter.
After an introduction that delves into the major differences between a customs union and a free trade area, the customs rules that applied and regulated trade in goods between the UK and the EU pre-Brexit will be presented.
Reference will therefore mainly be made to the provisions of EU Regulation 952/2013 which laid down the Union Customs Code.
Under the provisions of this Regulation, the exchange of goods between the UK and the EU, when the UK was still a Member State, could essentially take place without border controls and without the payment of duties.
As a result of Brexit, however, new customs formalities and requirements have inevitably arisen for UK or EU traders and these will be listed in detail in the second part of this chapter.
After highlighting these new customs procedures and related complexities that have resulted from the UK's withdrawal from the EU, the chapter will introduce the rules of origin provided for in the Trade and Cooperation Agreement which, if complied with, basically allow traders on both sides to enjoy an exemption from paying import duties.
As said, these rules will be precisely outlined, but also other aspects related to them, such as the formal procedure that a UK or EU economic operator has to follow to apply for duty-free treatment.

The last topic of the chapter will be an in-depth look at the case of Northern Ireland since, as is the case for VAT, the customs rules that apply in Northern Ireland are not the same as those that apply in the rest of the UK.

Following the third chapter there will be the last part of this thesis, which deals with conclusions.

The major critical issues and complexities that Brexit has brought about on UK and EU businesses will be recalled here, and it will also be highlighted on which of the two parties, i.e., the UK and the EU, the changes and effects that Brexit has had on VAT and customs may have caused more complexity.

Furthermore, a possible future scenario will be presented in the conclusions in order to understand how UK-EU relations might evolve following Brexit.

CHAPTER 1

The transition from EU Law to the three post-Brexit regimes in the UK

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1.1 Introduction: from Britain's entry into the EEC to its exit from the EU

23rd June 2016 represents a historic date for the United Kingdom as well as for the European Union.

On that day, the British electorate was called upon to vote, with a choice between two options: voting for the UK to remain in the European Union or voting to leave the European Union. The referendum ended with 51,89% of the votes in favour of the second option, officially decreeing the beginning of the first stage of "Brexit"[1].

The need to hold a referendum of this kind, so important and crucial, clearly did not arise from one day to the next, but there are underlying motivations that must be sought by analysing the relationship between the UK and the EU from the very beginning.

For this purpose, i.e., to retrace their always not cooperative relationship, it is necessary to look back at the history and milestones of the formation of the European Union.

Paradoxically, one of the first to support and propose an idea of a unified and integrated Europe was Winston Churchill, in his famous speech at the University of Zurich in 1946.

Indeed, the disastrous economic, social and political consequences of the post-war period, which involved and overwhelmed most of the European states, had to be translated, according to Churchill, into the creation of a United Europe.

[1] The 2016 referendum was confirmed by a British law (European Union Referendum Act 2015) enacted on 17 December 2015. This law established the time limit within which this referendum could take place and regulated the information obligation of the government. The law also set out the rules on the conduct of the election campaign.

In particular the British Prime Minister referred to the need to recreate the "European family" through the creation of an organisation whose name, according to him, could have been "The United States of Europe".

Only in this way could lasting peace and a period of stability, which were necessary for economic recovery, be guaranteed.

The end of his speech, however, seemed to implicitly admit that the process of creating a United Europe should have not directly involved the United Kingdom.

"Great Britain, the British Commonwealth of Nations, mighty America - and, I trust, Soviet Russia, for then indeed all would be well - must be the friends and sponsors of the new Europe and must champion its right to live and shine. Therefore I say to you "Let Europe arise!"[2].

A few years after Winston Churchill's speech, the first step towards the Union we know today was taken.

In 1951, indeed, the Treaty establishing the European Coal and Steel Community (ECSC) was signed in Paris and the six signatories were Belgium, Italy, Luxembourg, France, the Netherlands and West Germany[3].

Article 2 of the same treaty defines its objectives, which involved the pursuit of "*economic expansion, the development of employment and the improvement of the standard of living in the participating countries through the institution".*

In pursuit of these goals, and in order to promote the creation of a solid integration process, the signatory states agreed to pool their iron and coal resources, thus establishing a single market which resulted in a significant economic growth and increased production efficiency[4].

The process of European integration continued successfully, so much so that in 1957 two treaties involving the six signatory countries, mentioned above, were signed: the Treaty establishing the European Economic Community (EEC), which later became the European

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[2] CHURCHILL W., 1946, speech delivered at the University of Zurich, p.3, available at https://rm.coe.int/16806981f3 [Accessed 12/09/2021].
In this speech, Winston Churchill, advocates the creation of a United Europe, yet defines Britain's role as marginal to the creation process. He defines the UK only as the "friend and sponsor of the new Europe".
Moreover, at the end of his speech, with the words "Therefore I say to you: let Europe arise!", he seems to be addressing directly to the European States, implicitly suggesting that the task of creating this new Europe was not the responsibility of the United Kingdom.

[3] GABEL M. J., 2020, European Union, *Encyclopaedia Britannica (online),* available at https://www.britannica.com/topic/European-Union [Accessed 12/09/2022].

[4] From 1952 to 1960, indeed, following the conclusion of the ECSC Treaty, iron and coal production grew by 75% in the area of the signatory states. See BLACK I, 2002, Europe's coal engine of integration retires*, BBC* (online), available at https://www.theguardian.com/world/2002/jul/19/worlddispatch.eu [Accessed 13/09/2022].

Community (EC), and the Treaty establishing the European Atomic Energy Community (Euratom)[5].

In the light of these Treaties, the signatory countries began to enjoy other numerous commercial and non-commercial advantages, including, especially, the creation of a common market based on the free movement of goods, services, people and capital, as set out in the Article 3 of the EEC Treaty.

At this point, in 1961, the British Conservative Prime Minister Harold Macmillan decided to join the EEC, to enjoy the important trade benefits of the flourishing European market.

The President of the French Republic, Charles De Gaulle, however opposed this, exercising his first veto in 1963.

In 1967, the same French President again opposed Britain's entry into EEC[6]. Indeed, the French General was convinced that the UK saw the European Community as a mere lifeline to revive its economy, and that it was not really interested in the European project, nor in the values and principles on which the European Community was based.

De Gaulle also believed that the UK would always give greater importance and priority to its privileged relationship with the US than with other European countries.

This could have led to a slowdown in the process of European integration, something that De Gaulle was keen to avoid.

It was not until 1973, after lengthy negotiations, that the United Kingdom, along with Denmark and Ireland, joined the EEC thanks to the will of the new French President G. Pompidou, who did not oppose Britain's request.

The relationship between the EEC and the UK, however, seemed to sour just a year after the latter's entry.

Indeed, the Labour Party, winner of the 1974 general election, called in the same year for a renegotiation of the terms and conditions of Britain's access to the EEC[7].

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[5] The two Treaties mentioned here were both signed in Rome on 25th March 1957, taking effect on 1 January 1958. The EEC Treaty in particular has undergone several amendments in the course of time. The Maastricht Treaty on European Union (1993) renamed it, from Treaty establishing the European Economic Community to Treaty establishing the European Community or EC Treaty. The Lisbon Treaty (2009) made a further change to its name, from EC Treaty to Treaty on the Functioning of the European Union (TFUE).

[6] WALL S., 2012, Britain and Europe, *The Political Quarterly*, 83(2), p. 328.

[7] For further information on such 1974 renegotiation request, see PINDER J., 1975, Renegotiation: Britain's Costly Lesson?, *International Affairs (Royal Institute of International Affairs 1944-)*, 51(2), pp. 153–165.

In view of the poor results obtained after this renegotiation attempt, in 1975, a referendum was already held, in which the British people were officially asked whether they wanted to remain in the EEC[8].

In the intervening years, the gap between the EU and the UK has not seemed to be closing.

The latter, indeed, seems to have historically maintained a reticent attitude towards the process of creating a single, united Europe.

In other words, The United Kingdom has always seemed to be trying to pull back when other countries have pushed for greater integration.

It is no coincidence that the British have repeatedly made use of the opting-out clauses, which basically allow a member country to refuse to adopt a certain EU policy.

Taking advantage of these clauses, the UK has decided, for example, not to join the Schengen Treaty[9], not to adopt the Euro as a currency and to exclude itself from being bound by the Charter of Fundamental Rights of the European Union.

This shows that in fact this country's interest in pursuing strong integration within this community, at the expense of its own sovereignty, has never been paramount, quite the contrary.

This principle of sovereignty has always been fundamental to the United Kingdom.

Margaret Thatcher herself, elected Prime Minister in 1979, held this theme very dear. Famously, in a 1988 speech in Bruges, she strongly criticised the European Community and its supranational and supreme approach, to the detriment of the British sovereignty: *"We have not successfully rolled back the frontiers of the state in Britain, only to see them re-imposed at a European level with a European super-state exercising a new dominance from Brussels"*[10].

In 1993, the consolidation of anti-European sentiment led also to the formation of a political party, the UK Independence Party (UKIP), whose main objective was to take United Kingdom out of the European Union.

[8] The Referendum Act 1975, an act of the British Parliament, provided for the holding of this referendum. According to the same act, the referendum was held on 5 June 1975, and ended with the victory of the "Remain", voted for by 67.23% of the voters.
See MILLER V., 2015, *The 1974-75 UK Renegotiation of EEC Membership and Referendum*, House of Commons Library, available at https://commonslibrary.parliament.uk/research-briefings/cbp-7253/ [Accessed 14/09/2022].

[9] The Schengen Convention, signed on 14 June 1985, is a treaty which aimed to create an area, called the Schengen area, where borders are abolished and where the free movement of people within this area is guaranteed. The treaty was initially signed in Luxembourg by only five European countries, namely France, Germany, Luxembourg, Belgium and the Netherlands.
Since the 1990s, this treaty and the idea of a Europe without borders has stimulated the interest of more and more countries, so much so that there are now 26 member countries that can fully enjoy the benefits of belonging to the Schengen area. Of these 26 countries, 22 are members of the European Union, plus Switzerland, Liechtenstein, Norway and Iceland.
See RAY M., 2021, Schengen Agreement, *Encyclopaedia Britannica (online),* available at *https://www.britannica.com/topic/Schengen-Agreement* [Accessed 16/09/2022].

[10] PALMER J., 1988, September 21 1988: Thatcher sets face against united Europe, *The Guardian (online),* available at https://www.theguardian.com/business/1988/sep/21/emu.theeuro [Accessed 16/09/2022].

As a confirmation of a Euroscepticism that increasingly involved the British population, suffice it to say that UKIP in the 2014 European elections became the most voted British Party, with more than 4.300.000 votes[11].

In the light of all the above considerations, UK's decision to hold this 2016 Referendum, therefore, does not appear to be totally surprising and unexpected, but there are, in fact, as shown, historical reasons and motivations behind it.

1.2 EU law in the United Kingdom (1st January 1973-31st December 2020)

As mentioned above, the UK joined, not without difficulty, the European Economic Community in 1973, after a period of lengthy negotiations.

From that date, therefore, European law, its treaties and its principles began to become binding and produce legal effects in the UK, as for all other Member States.

EU law, in particular, started to produce legal effect in the UK by virtue of the European Communities Act (ECA 1972), an act of the British Parliament regulating the accession of the UK to the EEC and the adoption of EU law into national law.

As regards the latter aspect, i.e., the procedures by which European legislation became part of UK domestic law, sections 2(1) and 2(2) of the ECA 1972 were of particular relevance.

Section 2(1), indeed, provided: "*All such rights, powers, liabilities, obligations and restrictions from time to time created or arising by or under the Treaties [...] as in accordance with the Treaties are without further enactment to be given legal effect or used in the United Kingdom shall be recognised and available in law, and be enforced, allowed and followed accordingly*".

What is set out in this section essentially states that provisions of EU law that were deemed to be directly applicable, such as EU regulations, became automatically incorporated into UK legal system, without the need for any further step of incorporation or transposition.

The need to adopt a further step of incorporation, however, was necessary for those European acts that were not characterised as having direct applicability, such as European directives. In this case indeed section 2(2) provided that such European provisions had to be given effect by a domestic law, in order to be enforceable and applicable in British law[12].

This legal scheme set out in the ECA 1972 clearly applied as long as the country was a member of the European Union.

[11] HUNT A., 2014, UKIP: The story of the UK Independence Party's rise, *BBC (online),* available at https://www.bbc.com/news/uk-politics-21614073 [Accessed 17/09/2022].

[12] See HOWE G., 1973., The European Communities Act 1972, *International Affairs (Royal Institute of International Affairs 1944-)*, pp. 1-13.

The United Kingdom European Union Referendum, held on 23rd June 2016, indeed, by determining the will of the majority of the British people to end membership in the EU, brought inevitably a change in the applicability and validity of European law within British legal system. Such change, as reported above, can be identified in the fact that the UK, having decided to exercise the withdrawal clause contained and established in Article 50 TEU, is no longer subject and bound from the official day of its exit to the obligations imposed by the European law.
In this regard, notwithstanding the fact that the UK's official exit day is 31st January 2020, it is necessary to point out that Article 136 of the Withdrawal Agreement expressly states that *"There shall be a transition or implementation period, which shall start on the date of entry into force of this Agreement and end on 31 December 2020."*
At this point, a doubt might arise, as to the limit within which European law could have been considered applicable, i.e., by the exit day (31st January) or until the end of the implementation period.
Such doubt is promptly resolved by Part Four, Article 127 (1) which provides that *"Unless otherwise provided in this Agreement, Union law shall be applicable to and in the United Kingdom during the transition period".*
It was until 31st December 2020 therefore that Union law, which will discussed below, applied in full effect in the UK through the legal system seen before and established by the ECA 1972.
Now that all these aspects are clarified, there is clearly a need to analyse in detail which are the sources of the European legislation, i.e., those acts which have contributed to originate and innovate EU law over time and which, consequently, found application and legal effect in the UK legal system until the end of the transition period.
In particular, three different categories of sources can be considered, which will be discussed accordingly in the subsequent subparagraphs: primary sources (primary EU law), secondary sources (secondary EU law) and supplementary sources of law.

1.2.1 Primary EU law

The sources of primary law are of paramount importance for the European Union and all its Member States and that is why they are essentially identified at the top of the hierarchy of Union sources.
The most important sources of primary law are first and foremost the founding treaties of the European Union, i.e., the Treaty on the European Union (TEU) and the Treaty on the Functioning of the European Union (TFEU), which according to Article 1 TEU are deemed to be equivalent as concerns their legal value.

Their importance is unequivocal, considering that their principles and measures constitute the cornerstones and foundations on which the Union is based, and this is stated once again in Article 1 of the TEU.

In addition to this, both Treaties are capable of producing direct effect[13], provided that they comply with certain conditions laid down by the European Court of Justice in the judgment *Van Gend en Loos* of 5 February 1963.

In this sense, the CJEU ruled that the provisions of these Treaties, in order to have direct effect, must simultaneously be sufficiently clear and precise, unconditional and, clearly, confer a specific right on individuals.

Having said that, when analysing the two Treaties individually, differences, which will be discussed below, clearly emerge with regard to their history, evolution and content.

Starting with the TEU, it was signed on 7 February 1992 in the Netherlands, in Maastricht to be precise, by the twelve Member States of the European Economic Community (EEC)[14].

With this treaty, these countries wanted to give concrete form to a project for the political union of Europe, which was to flank and complement an economic community already achieved and developed in the form of the EEC[15].

The will to implement this union on a political level was already born in the 1980s, but it was only after the fall of the Berlin Wall and the subsequent reunification of Germany that it was really possible to do so. That is why it was only in 1992 that such a Treaty was signed.

That said, the TEU, or Maastricht Treaty, determined the birth of the European Union on the basis of three important pillars: the European Community, the Common Foreign and Security Policy (CFSP) and Police and Judicial Co-operation in Criminal Matters (PJCCM)[16].

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[13] The direct effect of EU law has been enshrined by the Court of Justice in the judgement of Van Gend en Loos of 5 February 1963.
In this judgment, the Court established for the first time that the European legislation was not only addressed to the Member States, but also to individuals and was therefore also capable of producing rights in favour of those same individuals.
In particular in this legal case the individuals were recognised as having the possibility and the right to invoke certain European acts directly before national and European courts and this is exactly what is meant by direct effect. In the Van Gend en Loos sentence, however, the CJEU stated that not all European provisions have direct effect. The latter applied indeed subject to the condition that obligations that may arise from the EU Treaties must be precise, clear and unconditional. Only when these conditions are all met does the European law in question have direct effect, meaning that it can be invoked before a national court directly by individuals.
It is important to specify here that these requirements were established by the Court of Justice with reference to the provisions of the European Treaties. In the judgment in question, the principle of direct effect was discussed with reference to article 12 of the EEC Treaty.
On this point, further information available at ROBIN-OLIVIER S., 2014, The evolution of direct effect in the EU: Stocktaking, problems, projections, *International Journal of Constitutional Law*, 12(1), 165-188.

[14] The twelve Member States which signed the Maastricht Treaty in 1992 were: Belgium, Denmark, France, Greece, Ireland, Italy, Luxembourg, Portugal, Spain, the Netherland, the United Kingdom.

[15] HERKERT K., LOWEN L., MCKINNELL W., & ROSE, T., 2009, Treaty Of Maastricht.

[16] Ibid.

Another incredibly important innovation brought about by this treaty was the establishment of a monetary union, which led to the introduction of the Euro[17].

Of course, the text of the 1992 Treaty has not remained untouched, but over the years it has been amended by other treaties, such as the Lisbon Treaty of 2007, until we arrive at today's TEU, which consists of 55 articles.

The provisions contained in these articles regulate and govern the fundamental aspects and principles of the Union, establish and describe the competences of the EU and its institutions and define the measures relating to the common foreign and security policy[18].

The TFUE, on the other hand, dates back to one of the 1957 treaties of Rome, namely the treaty establishing the European Economic Community, which has then been modified several times in order to bring it up to date.

Some of the treaties that have entailed and applied changes to it are the 1992 Treaty of Maastricht, mentioned above, the 1997 Treaty of Amsterdam, the 2001 Treaty of Nice and the 2007 Treaty of Lisbon, the latter renaming the original EEC Treaty to its current name, i.e., the Treaty on the Functioning of the European Union (TFEU).

The TFEU, updated to the current time, is composed of 358 articles which constitute basically a more detailed expression of the principles laid down in the TEU[19].

The structure of the TFEU comprises in particular 7 Parts: Part One (Principles), Part Two (Non-discrimination and Citizenship of the Union), Part Three (Union Polices and Internal Actions), Part Four (Association of the overseas countries and territories), Part Five (External Action by the Union), Part Six (Institutional and Financial Provisions) and Part Seven (General and Final Provisions).

In addition to the TEU and the TFEU, the sources of primary law also include the Treaty on the European Atomic Energy Community (Euratom), treaties amending the European Union, the treaties on the accession of new countries to the EU and the Charter of Fundamental Rights[20].

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[17] The Treaty of Maastricht introduced an essential element in the history of the Union, namely the creation of an economic and monetary Union (EMU), the main objective of which was to establish a European area with a single currency, the "Euro". However, access to this "Eurozone" was not immediate, but a Member State had to meet several convergence criteria, such as a government debt-to-GDP ratio of less than 60%, in order to join the EMU. On 1st January 1999, therefore, of the 15 EU Member States, 11 joined the Monetary Union and adopted the Euro as a single currency.
Of the four countries that remained outside, Greece and Finland did not meet the entry criteria, while the UK and Denmark decided to adopt and exercise the opt-out clause.
On this subject, see HORSPOOL M., HUMPHREYS M., 2012, *European Union Law*, OUP Oxford.

[18] For a detailed analysis article by article of TEU, see BLANKE H. J., & MANGIAMELI S., (Ed.), 2013, *The Treaty on European Union (TEU): A commentary*, Springer.

[19] The TFEU, indeed, as its name suggests, regulates the functioning of the European Union, following the articles and the principles laid down in the TEU. These two founding Treaties are therefore closely linked, so much so that in 2005 there was an attempt, which subsequently failed, to merge these two treaties into a single text.

[20] The Charter of Fundamental Rights of the European Union was introduced as a primary source after the entry into force of the Lisbon Treaty in 2009.

1.2.2 Secondary EU law

In the hierarchy immediately behind primary law, which is, as we have seen, of paramount importance for the European Union, come the sources of secondary law.

In particular, secondary law consists of unilateral acts which can be adopted by the EU institutions on the basis of what is laid down in the articles of the EU Treaties governing the competences of the European Union itself and of its institutions.

The sources of secondary EU law are referred to and defined in Art. 288 of the Treaty on the Functioning of the European Union[21].

Such Article mentions regulations, directives, decisions, opinions and recommendations as unilateral acts.

Regulations shall first of all have general application, meaning that they are not addressed to a specified and particular addressee, but rather to one or more abstractly determined categories of addressee.

In addition, regulations shall be binding in its entirety and directly applicable in all Member States. Partial or selective application of the regulations is therefore not permitted, as they are binding in its entirety, and they do not require any enactment or incorporation, as they are automatically integrated in a national legal system.

Directives are binding on the Member States to which they are addressed "as to the result to be achieved" (Article 288 TFEU), but leave it to the national authorities to decide the form and means necessary to achieve that result.

The Charter represents an important reference text that defines and groups together the fundamental social, economic, political and civil rights that must always be granted to everyone living in the EU. Such rights are recognised by the Union by virtue of Article 6 of TEU, which expressly states that "The Union recognises the rights, freedoms and principles set out in the Charter of Fundamental Rights of the European Union […], which shall have the same legal value as the Treaties". In particular the Charter of Fundamental Rights is composed by 6 Chapters: Dignity, Freedoms, Equality, Solidarity, Citizen's rights, Justice.

Importantly, apparently similar to the Charter is the European Convention of Human Rights. They do of course have differences and should not be confused.

First of all, the Charter on Fundamental Rights, drafted by the EU, is interpreted by the CJEU, in contrast to the European Convention, drafted in 1950 by the Council of Europe, whose interpretation is the competence of the European Court of Human Rights. Another substantial difference lies in the fact that the Charter of Fundamental Rights, constituting the overarching legal framework for the codification of fundamental rights, de facto includes and in a sense incorporates within itself what is laid down in the Convention, that therefore forms part of it.

[21] In addition to the unilateral acts expressly provided for in Article 288 TFEU, there are others that are defined as "atypical", precisely because they are not mentioned in the nomenclature in Article 288. The need to implement these atypical acts stems from the fact that they allow for greater elasticity and flexibility in the legislative process. These acts, which are generally non-binding, include, by way of example, Declarations, Resolutions, Communications, Deliberations, White Papers and Green Papers.

More details on these atypical acts may be consulted at:

LIN C. H., 2020, Legal Development of Atypical Acts in the European Union with Some Reference to Spectrum Management Legislation, *Athens JL*, 6(1), pp. 9-36.

Importantly, unlike regulations, national legislators have to enact a domestic measure, within a time limit, to transpose directives into the national legal system so as to give them legal effect and applicability.

Subject to certain conditions, directives may also produce direct effect in order to ensure adequate protection of individual rights.

In this respect, the Court of Justice has ruled that directives which are sufficiently clear, precise, unconditional and which have not been implemented by a Member State within the prescribed time limit, are qualified as having direct effect[22].

The unilateral acts that are dealt with after directives, according to Article 288 TFEU, are decisions. The same article states that decisions *"shall be binding in its entirety"* and moreover, if a decision expressly specifies "*those to whom it is addressed",* then it shall be binding only to them.

Opinions and recommendations, instead, *"shall have no binding force"*[23], meaning that they do not confer any rights nor obligations on the parties to whom they are addressed.

With reference to the functional nature of these acts, recommendations are used and employed by the various European institutions to suggest a uniform direction and often contain a direct invitation to Member States to conform to a certain orientation and behaviour.

Opinions, on the other hand, are acts by which the main European institutions, but not only them[24], can express their opinions and position on different subjects such as, for example, a proposed European Union law.

1.2.3 Supplementary sources of law

In addition to the primary and secondary sources mentioned above, European law also consists of so-called "supplementary" sources of law, which include case law developed by the European Court of Justice (CJEU), international law, on which the CJEU often draws in the elaboration of its jurisprudence[25], and general principles of European law, articulated by the CJEU in the elaboration of its case law.

[22] Direct effect can be recognised for European directives if certain conditions set out by the CJEU are met. What is relevant at this point is that directives may be granted only vertical direct effect, not horizontal. This basically means that rights granted to individuals by virtue of directives direct effect can be enforced against Member States or EU institutions, and not against other individuals.
Diversely, TEU/TFEU provisions with direct effect can be enforced both horizontally and vertically.

[23] Article 288 TFEU.

[24] Apart from the main EU institutions, such as Commission, Council and Parliament, opinions can be also issued by the Committee of the Regions and the European Economic and Social Committee.

[25] In this sense, the CJEU often draws on the international law, insofar as it can be applied and is compatible with the principles and rules of the European Union.
The international law, which can be briefly defined as the set of norms and rules governing relations between states, plays therefore a relevant role in the context of the production of the Court's case law.

That said, it is clear that an essential role, with regard to this category of sources, is played by such Court, whose powers and composition are defined in Article 19 TEU and Part Six, Chapter 1 of the TFEU.
According to the provisions of such Treaties, in particular, the main function of this European institution is to ensure the correct interpretation and application of European law in each Member State.
With reference to the Court's competence to define the correct interpretation of European legislation, Article 267 TFEU provides that *"The Court of Justice of the European Union shall have jurisdiction to give preliminary rulings concerning:*
(a) the interpretation of the Treaties;
(b) the validity and interpretation of acts of the institutions, bodies, offices or agencies of the Union;".
According to it, therefore, whenever the interpretation or validity of a European rule is in question, the national court or tribunal of a Member State may refer the matter to the CJEU for a preliminary ruling[26].
Of course, however, the Court of Justice does not only intervene in this respect, but also adjudicates on cases and legal disputes of different nature, thus producing a substantial body of case law which represents a point of reference for the Member States and their national courts or tribunals.
Moreover, as mentioned above, the CJEU in the elaboration of its case law often refers to and applies a category of principles called general principles of EU law.
Broadly, such principles may derive from the national legal systems of the various Member States and include, as a way of example, the principle of legal certainty, of equality, legitimate expectations, of non-retroactivity of criminal law and many others.
Basically, as such principles are present and common to most legal systems, they also contribute to forming the EU legal basis.
Other principles are instead deemed to be specifically proper to the legal order of the European Union, as they aim to regulate aspects such as the relationship between the community itself and its Member States or the relations between the EU institutions. These include, by way of

[26] The difficult for a national court in determining the correct meaning or validity of a European law often arises when there is no existing case law developed by the CJEU dealing with this new legal situation. The CJEU, therefore, after the request of a Member State, is entitled to issue a decision, which will become binding, as to the correct interpretation to be made of the European legislation deemed ambiguous or equivocal.

example, the already mentioned principle of direct effect, the principle of supremacy[27], the principle of free movement and the principle of institutional balance[28].

Having said that, already in the 1950s the Court articulated and established general principles in its judgments and, in fact, the origin of the principle of proportionality[29] and non-discrimination[30] is to be found in the CJEU case law of those years.

Up to the present time, there has been no end to the production and application of various principles, and this is clear if considering the essential function that they play.

With these principles, which have made it possible to give homogeneity and greater comprehensiveness to the Union's legal order, the Court has indeed been able to supplement the EU legal order itself, filling in certain deficiencies and gaps in it and in its founding treaties. Moreover, they also provide a further tool to assist in the interpretation of EU law.

It is also important to note that general principles do not always and exclusively locate rights in the hands of individuals or businesses against their Member States, but rather vice versa.

As a way of example, the general principle of "abuse of law"[31] may be cited to illustrate this. Put simply, locating a subsidiary company and its related profits in a privileged taxation state *"without truly exercising the rights of establishment by way of having relevant staff, premises and sufficient economic resources to truly locate any profit in that low tax Member State[32]"*, may be referred to as an "abuse" of the right of the establishment set out in Article 49 TFEU. When this circumstance arises, then the Member State may resort to and impose its taxation on that subsidiary, which will consequently not be subject to the tax regime of the privileged taxation state.

Finally, the hierarchical status of general principles in the European legal order should also be specified.

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[27] The principle of supremacy regulates the relationships between the European law and national law whenever they conflict each other.
In particular it establishes that where a conflict arises between an aspect of EU law and an aspect of domestic law in a Member State, EU law prevails. In other words, this principle affirms the superiority of European law over national law, whenever they contrast with each other. This principle has been enshrined by the CJEU in the *Case 6/64, Flaminio Costa v. ENEL, 1964.*
On this point, see PUDER M. G., 2004, Supremacy of the law and judicial review in the European Union: celebrating Marbury v. Madison with Costa v. Enel, *George Washington International Law Review*, 36, pp. 567-586.

[28] For more information on the classification of general principles see DANIELE L., 2010, *Diritto dell'Unione Europea. Sistema istituzionale, ordinamento, tutela giurisdizionale, competenze*, Giuffrè Editore, pp. 158-165.

[29] The principle of proportionality, which aims to regulate the exercise of EU competences, was enshrined for the first time by the CJEU in the Case *C-8/55, Fédération Charbonnière de Belgique v High Authority of the European Coal and Steel Community.* Now such principle has also been codified and is expressly referred to in Art 5.4 TEU.

[30] *Case 14/59 Pont-a-Mousson v High Authority [1959].*

[31] The term "abuse of law", in the tax field, broadly, refers to the activity and conduct adopted by a party in order to circumvent tax rules and thus obtain an undue tax advantage.

[32] SACCARDO N., et al., 2021, *Tax implications of Brexit, Bloomsbury Professiona*l, Kindle version, Chapter I, paragraph 1.11.

They are given the legal status of primary sources and are therefore placed in a higher hierarchical position than secondary law and international treaties[33] signed by the Union.
In line with this, general principles not only take on an interpretative function of European law, but may also be used as criteria for verifying and reviewing the legality of European measures.
Indeed, one of the main reasons why EU secondary law may be annulled by the Court of Justice is precisely because a provision of secondary law is in contradiction with a general principle.

1.3 The three post-Brexit regimes in the UK

The sources of European law mentioned above jointly contribute to forming the European legal order, i.e., the set of rules and measures that define the organisation of the European Union, its functioning and the relationship between the EU itself and its Member States.
It is clear, however that if a State decides to cease being a party to the European Union, as in the case of the UK, then it will be no longer subject to the obligations and rights that arise from the above sources.
With regard to the United Kingdom, as discussed in section 1.2, EU law no longer applies from 31st December 2020.
That said, the cessation of the effectiveness and applicability of European law from that date, but more generally, the decision to leave such an integrated community, following the 2016 referendum, inevitably led to the raising of various issues to which the two sides, the UK and the EU, had to find appropriate solutions in a relatively short time.
First of all, the UK was the first state which opted to exercise the clause contained in Article 50 TEU, to withdraw from the Union.
In the light of this, the two parties, therefore, had to face a completely new and uncertain situation, as no similar case had emerged before, and this translated in a withdrawal process that was certainly not simple and straightforward.
Subsequently, it was also necessary to formulate and conclude new treaties between the parties, to regulate their commercial, political and social relationship.
Indeed, while their connection was previously largely regulated by the above-mentioned sources of European law, in particular by the founding treaties, it follows that after the

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[33] The EU concludes several treaties with third countries at international level, which is evident if considering its economic and commercial importance in the international arena.
Article 216 (1) TFEU, in this respect, establishes the competence of the Union to conclude such agreements, while Art. 216 (2) establishes their legal force, by expressly stating that "*Agreements concluded by the Union are binding upon the institutions of the Union and on its Member States*." These treaties concluded by the EU with third countries, therefore, constitute an important and "separate" source of European law, as they are not part of neither the primary nor the second category of sources. As far as their relevance within EU law is concerned, international agreements are positioned hierarchically above secondary sources, which therefore must comply with them.

implementation period the relationship between the UK and the UE needed to be redefined in a new Agreement.
In addition, an arduous question raised as to the need for the United Kingdom to give continuity to its legal system after 31st December.
After this date indeed, it became necessary, in order to avoid a massive lack of regulation, to determine how to replace the EU provisions that had supplemented the British national law for 47 years.
To meet these needs which naturally arise after the decision to withdraw from such an integrated community, the UK has put in place three post-Brexit regimes, with the aim of achieving the aforementioned objectives, such as pursuing a withdrawal as orderly and clear as possible, preserving continuity of regulation in all those areas that previously found a legal basis in EU law, and defining a new commercial agreement with the European Union.
These three post-Brexit regimes are identified in the Withdrawal Agreement, in the "retained EU law" and in the Trade and Cooperation Agreement (TCA), which will be discussed in detail in the subsequent subsections.

1.3.1 The EU-UK Withdrawal Agreement

The Withdrawal Agreement was concluded by the EU and the UK on 24th January 2020 and it came into force on 1st February 2020.
Before proceeding to an analysis of the structure of this Treaty, it is appropriate to clarify that this possibility for a Member State to withdraw voluntarily and unilaterally from the European Union is provided for by the TEU, precisely by Article 50 (1) TEU, which states: *"Any Member State may decide to withdraw from the Union in accordance with its own constitutional requirements."*
The same Article also regulates the various procedural aspects necessary to complete and finalise the withdrawal. However, being the first time it has been triggered, it has turned out to be incomplete in some of its parts[34].
This Article indeed does not exhaustively specify all the stages of the procedure.
For instance, Art. 50 (2) states that "*A Member State which decides to withdraw shall notify the European Council of its intention."*, but there is no mention here of the way in which the State must give notice of the withdrawal.
These considerations, together with the inherent complexity of establishing an orderly and comprehensive withdrawal agreement, led to a negotiation period of three years.

[34] WIEDUWILT S., 2015, Article 50 TEU–The Legal Framework of a Withdrawal from the European Union, *ZEuS Zeitschrift für Europarechtliche Studien*, 18(2), pp. 169-205.

Indeed, the first stages of negotiations, which started on 19th June 2017, ended on 24th January 2020, the day on which the EU and the UK signed the Agreement.
After it was therefore drafted and completed, this Agreement was implemented in the UK legal system by a combination of provisions contained in the European Union Withdrawal Act 2018 (EUWA 2018) and European Union Withdrawal Act 2020 (EUWA 2020)[35].
With regard to the content of this Agreement, essentially the provisions contained in it aim to ensure an orderly withdrawal by regulating the termination of ongoing operations after the end of the implementation period, to protect the rights of the citizens of the two parties and to ensure that the financial commitments undertaken until the UK was part of the Union are fulfilled and respected.
In particular, the articles of this Treaty are divided into six parts[36].
Part One, called Common Provisions, sets out the clauses and provisions that must be complied with to ensure a proper understanding and interpretation of the Agreement.
In other words, this first part constitutes the backbone in the light of which the entire document must be read.
In this sense, Article 4, Part One recognises and attributes to the Withdrawal Agreement direct effect and supremacy, which are two principles typically relevant within European legal framework.
Direct effect is expressly attributed by Art. 4(1), according to which "*legal or natural persons shall in particular be able to rely directly on the provisions contained or referred to in this Agreement which meet the conditions for direct effect under Union law.*"
The above therefore entitles the parties and their individuals to invoke certain provisions of the Withdrawal Agreement, expressly those which meet the conditions for direct effect, directly before national courts, both in the UK and in the EU Member States.
The principle of supremacy, instead, is set out in Art. 4(2).

[35] In order to become enforceable and binding in the UK, the Withdrawal Agreement had to be transposed by a domestic law, which in this case are EUWA 2018 and EUWA 2020. This is necessary in view of the dualistic legal nature of this country, according to which international agreements cannot become enforceable in the national legal system if there is no domestic law giving effect to them.
See CRAIG P. P., 2020, The Ratifications of the Withdrawal Agreement: UK and EU Perspectives, *Brexit Institute Paper Series.*
[36] The Six Parts in which the Agreement is divided are: Part One (Common Provisions), Part Two (Citizens' Rights), Part Three (Separation Provisions), Part Four (Transition), Part Five (Financial Provisions), Part Six (Institutional and Final Provisions).
In addition to this Six Parts, the Withdrawal Agreement contains also Protocols on Ireland/Northern Ireland, Gibraltar and Cyprus.

In accordance with this Article, the UK must ensure compliance with the Withdrawal Agreement and thereby disapply any domestic legislation that is incompatible with the measures provided for in the Agreement[37].

Also relevant for interpretation purposes are Art. 4(3) and 4(4), which provide that the provisions of the Withdrawal Agreement that refer to EU law should be applied and interpreted "*in accordance with the methods and general principles of Union law*"[38] and also "*in conformity with the relevant case law of the Court of Justice of the European Union handed down before the end of the transition period*"[39].

By way of example, reference may be made to Article 12(2) of the Withdrawal Agreement, which deals with the prohibition of discrimination on grounds of nationality *"within the meaning of the first subparagraph of Article 18 TFEU".* In Article 12, therefore, there is an explicit reference to European law, in particular to Article 18 of the TFEU.

Consistent with the foregoing, Article 12 of the Withdrawal Agreement therefore falls within the scope of Art. 4(3) and 4(4) and must be interpreted accordingly.

Part II instead deals with citizens' rights and its provisions aim at protecting the life choices of EU citizens and UK nationals, so as to safeguard their right to work, study and live in their "*host country*"[40] even after the implementation period.

Basically, UK citizens who based their life choices on the right of free movement granted by EU law, will be able to continue to exercise such right in their host EU Member State even after the implementation period and the same is true for EU citizens wishing to continue to live, study and work in the UK.

What is protected concerns and includes rights of residence, social security, rights of employed and self-employed persons and recognition of professional qualifications.

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[37] The principle of direct effect of the Withdrawal Agreement is maintained and secured by section 7A of EUWA 2018, under which "*all such rights, powers, liabilities, obligations and restrictions from time to time created or arising by or under the Withdrawal Agreement, and all such remedies and procedures from time to time provided for by or under the Withdrawal Agreement, as in accordance with the Withdrawal Agreement are without further enactment to be given legal effect or used in the United Kingdom*".

The wording of this section, in particular, is similar to the wording of ECA 1972 section 2(1), with the natural difference that ECA 1972 gave direct effect to EU law within the UK legal order, whereas EUWA 2018 gives direct effect to the Withdrawal Agreement. Like the principle of direct effect, supremacy is also secured by EUWA 2018 section 7A (3) which states that "*Every enactment (including an enactment contained in this Act) is to be read and has effect subject to subsection (2)".*

[38] Article 4 (3) of the Withdrawal Agreement: "*The provisions of this Agreement referring to Union law or to concepts or provisions thereof shall be interpreted and applied in accordance with the methods and general principles of Union law."*

In particular, the notion "methods and general principles" of EU law includes all those general principles recognised by the European Court of Justice that complement and regulate the application and interpretation of European law.

[39] Article 4(4), Part I of the Withdrawal Agreement.

[40] "Host State" is defined in Article 9 (c), Part II of the Withdrawal Agreement.

With regard to this specific Part, in order to protect such a sensitive issue as citizens' rights, the national courts of UK are allowed, up to eight years after the end of the IP (implementation period), to apply to the CJEU for a preliminary ruling, so as to obtain a correct interpretation of the provisions contained in Part II.

In the UK, the effective implementation and enforcement of citizens' rights enshrined in this Part is also monitored by an independent national authority, namely the Independent Monitoring Authority, whose constitution and functions are regulated in Schedule 2 of EUWA 2020[41].

Part III, called "Separation Provisions", constitutes one of the most substantial sections of this Agreement.

This Part, contributing to the purpose of the Withdrawal Agreement to ensure an orderly exit, regulates and sets out the necessary modalities to be followed for the conclusion of ongoing processes.

In particular, some of the areas here regulated include the termination of ongoing events such as goods placed on the market before the end of the IP, ongoing customs procedures and ongoing VAT matters, ongoing protection of intellectual property, ongoing police and judicial cooperation in criminal matters and ongoing judicial cooperation in civil and commercial matters.

Following this Part, there is Part IV, called "Transition".

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[41] The Independent Authority in UK is mentioned in Part VI, Article 159 of the Withdrawal Agreement. According to this Article indeed *"In the United Kingdom, the implementation and application of Part Two shall be monitored by an independent authority (the "Authority")"*. The European Withdrawal Act 2020 (EUWA 2020) then, in Schedule 2 (Independent Monitoring Authority for the Citizens' Rights Agreements), regulates all aspects of it in detail, setting out provisions concerning its constitution and function.

In particular the IMA may *"if it considers it appropriate to do so in order to promote the adequate and effective implementation or application of Part 2" (EUWA 2020, Schedule 2, Part 2, paragraph 30 (1))* make an application for judicial review, intervene in any legal proceedings or carrying out inquiries. It is important however to emphasise that the IMA is not obliged to implement the remedies just listed.

The only obligation on this authority is to carry out a preliminary review whenever a complaint comes from individuals *(EUWA 2020, Schedule 2, Part 2, paragraph 29 (2))*. In such cases the preliminary review constitutes a useful tool for the Independent Authority to assess whether it would be necessary to carry out an inquiry, which allows to establish if the UK has effectively not complied with Part II. If this is the case, the inquiry, once it has been drawn up, will be sent to all relevant public authorities. However, again, the IMA is only obliged to carry out the preliminary review and not the inquiry that could follow. Indeed, Sch.2 Paragraph 29 (3) states that: "*In deciding whether to carry out an inquiry in response to a complaint, the IMA must consider whether it would be more appropriate for the person who made the complaint to deal with its subject matter by other means (for example, court proceedings) than for the IMA to carry out an inquiry*."

Therefore, although this independent supervisory body seems to fully safeguard the compliance with and proper implementation of Part II of the Withdrawal Agreement, it has actually no obligations to do so.

In other words, it is on the basis of its assessments that it decides whether or not to intervene in the manner described above. As an alternative to bringing a complaint before the IMA, however, it should be remembered that the Withdrawal Agreement, by having direct effect, allows citizens to invoke their rights directly before the national courts.

It provides for the application of the aforementioned implementation period until 31st December 2020, with the aim of giving business, administrations and citizens more time to adapt to the regulatory, economic, political and social upheaval following Brexit.

The implementation period was also essential to grant the parties more time to draft and conclude a trade treaty between them.

Having clarified this, the provisions contained in this Part additionally establish the status of the UK within the Union, its obligations and rights until 31st December 2020.

For instance, Art. 128 (1) states that during the transition period the UK could no longer take part in meetings of the EU's institutional bodies[42], such as the European Parliament.

This effectively deprived the UK the right to vote on possible new legislation which from 1st January 2021 would have not produced any effect in its legal system.

Moreover, with regard to the possibility of concluding new international agreements with third countries, the UK was granted the freedom to negotiate *"in the areas of exclusive competence of the Union"*[43], provided that such agreements would find application from the end of the transition period, not before[44].

Moving on, Part V, "Financial Provisions", contains provisions to ensure that both parties, the UE and the UK, respect and honour all financial obligations undertaken when the UK was still part of the European Union and finally, Part VI, "Institutional and Final Provisions", contains provisions defining the institutional set-up aimed at securing the effective management and application of the Agreement in its entirety.

In addition, dispute resolution mechanisms are also provided for.

Article 164(1) indeed provides for the establishment of a Joint Committee consisting of representatives of the United Kingdom and the European Union.

As regards its function, under Article 164(3): *"The Joint Committee shall be responsible for the implementation and application of this Agreement. The Union and the United Kingdom may each refer to the Joint Committee any issue relating to the implementation, application and interpretation of this Agreement."*

[42] Art 128 (1), referring to Art 7, Part 1, tends to prohibit the UK from taking part in meeting of the EU institutions. As an exception to this, however, Art 128 (5) provides that UK representatives may, only in specific cases, attend meeting of committees or other EU bodies by invitation. However, even in this case, the UK is denied the right to vote.

[43]Article 129 (4), Part IV of the Withdrawal Agreement.

[44] In particular Article 129 (4), Part IV, states that the UK is entitled to conclude a treaty in area of exclusive competence of the Union even if it enters into force before the end of the implementation period. However, this can only occur with the prior authorisation of the Union.

Therefore, should a dispute arise concerning the interpretation or application of the Treaty, the parties shall enter into a period of consultation within the Joint Committee with a view to reaching an agreed, mutually satisfactory, resolution[45].

However, if no such solution can be agreed upon within a specified time, the Parties may refer the matter to an Arbitration Panel, governed by Article 170 *et seq*.

According to Article 175 its ruling *"shall be binding on the Union and the United Kingdom",* and in case of non-compliance, temporary remedies are provided for in Article 178.

In particular, in such cases the Arbitration Panel may impose a penalty payment and if the non-complying party fails to pay it, Article 178(2) also provides for the possibility of suspending the obligations arising under this agreement.

Relevantly, this is an agreement setting out the terms and conditions of UK's withdrawal but does not regulate any aspects of the future EU-UK commercial and trade relationship. Consistent with this, it does not have prolonged temporal relevance, especially some of its measures.

Part V "Financial Provisions", for instance will lose its legal relevance at the time when the two parties have actually paid all financial obligations arising under this Part and the same is true for Part III "Separation Provisions", once all ongoing processes regulated herein are effectively terminated in accordance with the measures and modalities laid down.

1.3.2 Retained EU law

As mentioned above, EU law applied in full in the United Kingdom until 31st December 2020. In order to understand what has happened to Union law from 1st January 2021, it is necessary to delve further into the provisions contained in the European Union Withdrawal Act 2018 (EUWA 2018), as amended by the EUWA 2020[46].

The EUWA 2018, in this sense, sought to pursue a twofold objective.

Firstly, to preserve the continuity of the UK legal order after 31st December 2020 and, secondly, to ensure that UK laws enacted after 1st January 2021 are free from the EU supremacy principle as well as from the application of the other general principles of EU law.

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[45] Article 167, Part IV of the Withdrawal Agreement.

[46] The EUWA 2018 was issued before the Withdrawal Agreement, which introduced the implementation period in Part IV. Therefore, the provisions of the EUWA 2018 set the exit day, i.e., 31st January 2020 as the deadline by which European law had full effect in the UK. This has been remedied in the EUWA 2020, which makes amendments to the EUWA 2018 in order to take into account the provisions of the Withdrawal Agreement regarding the extension of the validity of the EU law until 31st December 2020. The "retained EU law", therefore, becomes part of domestic law under EUWA 2018, as modified by EUWA 2020, from the end of the implementation period, rather than from exit day, as originally set out in EUWA 2018.
See CRAIG P. P., 2020, The Ratifications of the Withdrawal Agreement: UK and EU Perspectives, *Brexit Institute Paper Series,* pp. 11-12.

With regard to the first objective, in order to preserve continuity and ensure the completeness of the legal system, the EUWA 2018 introduced the legal concept of "Retained EU law".

The latter constitutes a new category of domestic law which includes the EU legislation preserved by UK law after the end of the implementation period, i.e., as from 1st January 2021. In other words, the EUWA 2018 sought to preserve continuity by taking a snapshot of EU law as it applied until 31st December 2020, and then converting this legislation into UK law.

"Retained EU law" therefore is not EU law, but rather a set of domestic laws essentially replicating the text of European provisions in order to ensure legal certainty but above all to avoid a massive deregulation that would have resulted in the absence of such new legal category.

Importantly, European laws that are preserved and converted into UK law after transition period does not necessarily have to remain untouched in the years after Brexit, quite the contrary. Section 8 (1) of the EUWA 2018 in this respect provides for the possibility of amending "retained EU law" by regulations enacted by Ministers.

Indeed, EU law has always been formulated so as to be adequate and meet the needs of an integrated community consisting of several Member States and, in the light of this, if not amended it may be inadequate in a national context and in particular in a state that is no longer part of the community where these laws were born.

That said, "Retained EU law" encompasses three different categories of European legislation: "EU-derived domestic legislation", "direct EU legislation" and "rights".

"EU-derived domestic legislation" is regulated by section 2 of EUWA 2018.

According to it, "EU-derived domestic legislation" means any enactment which is made under section 2(2) of the ECA[47], any enactment passed or made for a purpose mentioned in section 2(2) of the ECA and any enactment *"relating otherwise"* to the European Union.

Basically, therefore, this category catches all the UK domestic enactments, carried out through primary and secondary legislation, somehow related to the EU or necessary to give effect to European legislation that was not directly applicable, such as Directives.

Section 2(1) of EUWA 2018 preserves the application of "EU-derived domestic legislation" by expressly stating that *"EU-derived domestic legislation [...], continues to have effect in domestic law on or after exit day"*.

[47] Section 2(2) of the ECA 1972 empowered the UK Executive to incorporate by secondary legislation all acts of European law which were not directly applicable.
In order to become applicable and effective in the domestic legal system, these European acts indeed required a domestic law to give them effect. For the purposes of section 2 of EUWA 2018, therefore, this secondary legislation produced by the UK Executive under section 2(2) of the ECA falls within the definition of the "EU-derived domestic legislation".

Importantly, as mentioned above, the provisions of the EUWA 2018 referring to "exit day", i.e., 31st January 2020, have been amended by EUWA 2020 in order to take into account the implementation period provided for in the Withdrawal Agreement.

In fact, s. 2 of EUWA 2018 has been modified by s. 25 (1) (a) of EUWA 2020, according to which, therefore, the term "exit day" is to be substituted by "IP completion day".

With regard to the second category, "direct EU legislation"[48], it is defined in section 3 of the EUWA 2018.

According to section 3 (2), "direct EU legislation" includes EU regulations, EU decisions or EU tertiary legislation.

Such legislation is converted by Article 3(1) which states that *"Direct EU legislation, so far as operative immediately before exit day, forms part of domestic law on and after exit day."*

Again, also such provision needs to be read considering the aforementioned amendments carried out by the EUWA 2020[49].

"Rights" are instead dealt with in section 4 (1), as amended by s. 25 (3) of EUWA 2020. According to it any rights, powers, liabilities, obligations, restrictions, remedies and procedures, which, immediately before the implementation period *"(a) are recognised and available*[50] *in domestic law by virtue of section 2(1) of the European Communities Act 1972, and (b) are enforced, allowed and followed accordingly",* will continue after the implementation period to *"be recognised and available in domestic law".*

Importantly, section 4 concerns the saving of all directly effective rights that are not already incorporated in the national legal system by virtue of section 3.

In other words, section 4 ensures that all those rights that do not fall under section 3 remain recognised and available even after the implementation period.

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[48] This category of retained EU law, needed expressly to be converted, as opposed to "EU-derived domestic legislation" which rather needed to be preserved. "EU-derived domestic legislation" indeed, being domestic and consisting of Acts of Parliament and secondary legislation, did not need to be converted into national laws as they were already national laws. On the contrary, "EU direct legislation" is not domestic, but consists of European Acts that are directly applicable by virtue of section 2(1) of the ECA 1972. In line with this, such legislation needed to be converted following the repeal of the ECA by the EUWA 2018, to be part of domestic law after the implementation period.
The ECA 1972 section 2(1), in fact, constituted the conduit pipe that made EU regulations and decisions directly applicable in the national laws of the Member States, without the need for a domestic law to incorporate them. After the repeal of ECA, such EU provisions would have lost effect instantly, if not saved or converted.

[49] S. 3 of EUWA 2018, concerning "Direct EU legislation" has been amended by EUWA 2020 s. 25 (2).

[50] See SACCARDO N. et al., 2021, *Tax implications of Brexit, Bloomsbury Professiona*l, Kindle version, Chapter V, paragraph 1.26. According to the authors, "recognised" could be intended and mean "acknowledged as part of the ratio of a decision", while "available" means enforceable, so available to be deployed. Importantly, rights in order to fall within the scope of section 4 must fulfil both conditions, i.e., be recognised and available in domestic law before exit day.

The Explanatory Notes of EUWA 2018, as a way of example, list a number of TFEU articles deemed to confer directly effective rights[51], which fall therefore within the scope of section 4 and are consequently preserved after the implementation period.

Another aspect to be mentioned with reference to this section concerns directives and in particular the rights that arise as a result of the direct effect[52] of directives.

Indeed, section 4(2) states that *"Subsection (1) does not apply to any rights [...] so far as they as they— (b) arise under an EU directive (including as applied by the EEA agreement) and are not of a kind recognised by the European Court or any court or tribunal in the United Kingdom in a case decided before* [the implementation period] *(whether or not as an essential part of the decision in the case).[53]"*

Having established the EU provisions that form part of the "retained EU law", it becomes at this point also important to introduce section 5 of EUWA 2018[54], which refers to the EU principle of supremacy and its validity from 1st January 2021 in the UK.

According to s. 5, any UK enactment passed or made on or after the end of the transition period is not subject to the EU principle of supremacy, meaning that such enactment cannot be disapplied because in contrast with the European law.

If, on the other hand, enactments or rule of law have passed before 31st December 2020 then the situation is different, according to section 5(2).

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[51] Some of the Articles of the TFEU, mentioned in the Explanatory Notes of EUWA 2018, considered to have direct effect are Art. 18 (non-discrimination on grounds of nationality), Art. 49 (Freedom of establishment), Art. 101 (1) (Competition), Art 102 (Abuse of dominant position) and 107 (1) (State Aid).
The principles contained in these Articles, therefore, fall within the scope of Section 4 of EUWA 2018.
For a more extended list of TFEU Articles deemed to contain directly effective rights see Explanatory Notes EUWA 2018, pp. 29-30.
It should be remembered at this point, however, that section 8(1) of EUWA 2018, as amended by S. 27 EUWA 2020, confers power on UK Ministers to amend pieces of "retained EU law", to cure its deficiencies.
In this sense, some principles, including for instance the right of establishment enshrined in Art 49 TFEU, even though they would fall within the scope of section 4 of EUWA 2018, are excluded from UK law, as it would not have made sense to maintain them in a post-Brexit context, where indeed UK no longer belongs to the European single market.

[52] Recall that the CJEU has established that a directive has direct effect only when its provisions are sufficiently clear and precise, unconditional and when an EU Member State has not implemented the directive by the deadline. Directives that fulfil such conditions are deemed to have direct effect.

[53] Interestingly, it may be noted that subsection 2 initially seems to deny that directives, and the rights that follow from them, belong to the category of "retained EU law".
The rationale behind this is that the directives should have already found their way into UK law through domestic laws implementing them.
Therefore, a provision in the EUWA 2018 stipulating the necessity of retaining the directives could be redundant. On further reading, however, the subsection states that the rights and provisions of the directives which are *"of a kind recognised by the European Court or any court or tribunal in the United Kingdom in a case decided before [IP completion day]"*, still come within the scope of subsection (1) and are therefore recognised even after the implementation period.
This is in order to protect rights arising by reason of the direct effect of directives when the latter had not been properly implemented in the UK, however subject to the condition that they are "*recognised by the European Court or any court or tribunal in the United Kingdom [...] before [IP completion day]"*.

[54] Section 5 of EUWA 2018 "Saving and incorporation", has been amended by EUWA 2020 section 26 (4), so as to take into account the implementation period provided for by the Withdrawal Agreement.

In such cases, indeed, this section attributes "retained EU law" primacy.
This basically means that UK acts passed before 31st December 2020 cannot be set against European law and it makes perfect sense considering that until 31st December the European law, and the principles thereof, applied in full in the United Kingdom.
A further consideration must also be made with regard to the general principles, which are of substantial importance in the European regulatory framework, in that they have undergone a major downsizing in the United Kingdom following the implementation period.
Schedule 1, paragraph 2 of the EUWA 2018 provides that *"no general principle of EU law is part of domestic law on or after exit day if it was not recognised as a general principle of EU law by the European court in a case decided before exit day"*[55].
This provision therefore lays down the conditions that general principles must fulfil in order to be suitable for inclusion in the UK domestic law after the implementation period.
The legal force and the effect of such principles instead are set out in Sch 1, para 3, which states that *"(1) There is no right of action in domestic law on or after [IP completion day] based on a failure to comply with any of the general principles of EU law [and] (2) no court or tribunal or other public authority may, on or after [IP completion day]: (a) disapply or quash any enactment or other rule of law, or (b) quash any conduct or otherwise decide that it is unlawful, because it is incompatible with any of the general principles of EU law."*[56]
This measure in particular reduces in an extreme way the importance and scope of these principles in the UK after IP completion day.
According to Sch 1, para 3 in fact, a UK law can no longer be subjected to a disapplication procedure on the grounds that it is contrary to these principles.
Furthermore, by also excluding the right of action based on non-compliance with a general principle, Sch 1, para 3 de facto excludes such principles from being binding and effective at all in UK, as they were until 31st December 2020.
In line with this, Paragraph 3, basically converts them to principles that perform a mere interpretative function of the EU law retained under section 2, 3 and 4 of EUWA 2018. The same interpretative function of EU law, in addition to general principles, is attributed to *"any*

[55] It is important here to recall that EUWA 2020 amended the provisions of EUWA 2018 in order to take into account the implementation period provided for in the Withdrawal Agreement.
In Sch 1, para 2 just quoted, therefore, the time reference is not the exit day, but the end of the implementation period.
[56] EUWA 2018, Schedule 1, paragraph 3 does not apply after IP in the specific cases set out by Schedule 8, paragraph 39 (5) of EUWA 2018, as amended by Schedule, paragraph 56 (5) of the EUWA 2020.

retained case law[57]", which basically means a combination of retained domestic case law and retained EU case law[58].

All of the considerations mentioned above in relation to "EU retained law" constitute the set of rules which have provided continuity, post-IP completion day, to the UK legal system.

As stated previously, the retained laws under section 2, 3, 4 of the EUWA 2018, as amended by EUWA 2020, are not immutable in time, but rather their amendment is permitted, to cure its deficiencies, under section 8 of EUWA 2018.

Finally, it is important to mention that the provisions of EU law which do not fall into the aforementioned categories of "retained EU law" will not form part of UK law in any way from 1st January 2021[59].

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[57] Section 6 (7), EUWA 2018.

[58] Section 6 (7), EUWA 2018, as amended by section 26 of the EUWA 2020, provides the definition for the terms "retained domestic case law" and "retained EU case law".

The former is defined as *"any decisions of a court or tribunal in the United Kingdom, as they have effect immediately before [IP completion day] and so far as they— (a) relate to anything to which section 2, 3 or 4 applies, and (b) are not excluded by section 5 or Schedule 1"*.

"Retained EU case law" is defined practically using the same words, with the obvious difference that the European Court's decisions will be retained here.

"Retained domestic case law", therefore, refers to decisions of domestic courts and tribunals, provided they were issued before the end of the implementation period and provided they relate to the contents of section 2,3,4 of the EUWA 2018. Moreover, in order to be preserved as from 1st January 2021, these decisions must not be excluded by section 5 or Schedule 1, which contains provisions concerning exceptions for savings.

All of the above also applies to "retained EU law", which refers to decisions and judgments of the CJEU retained after the end of the implementation period.

[59]The Charter of Fundamental Rights is not part of UK domestic law as of 31st December 2020 and this is expressly provided for in section 5(4) of the EUWA 2018, as amended by section 26(4) of the EUWA 2020. Despite this, UK remains a signatory country to the European Convention on Human Rights.

In addition to the Charter of Fundamental Rights, UK also repealed the Francovich claim, which was recognised by the CJEU in the judgment *Francovich and Bonifaci v Italy, Joined Cases C-6/90, 9/90*. In this legal case, the CJEU recognised and ruled that Member States can be held liable if they fail to implement an EU directive into national law. Specifically, in Francovich and Bonifaci v Italy, the offending State was Italy, which was indeed found to be at fault for failing to transpose a European directive within the prescribed time limit.

As a consequence to this, Italian citizens affected were granted the right to claim compensation for damages resulting from such failure. The CJEU in the above mentioned judgment, had, however established that claims based on directives were subject to the fulfilment of three conditions: first, that the result required by the directive includes the conferring of rights for the benefit of individuals; second, that the content of such rights may be determined with reference to the provisions of the directive; and, third, that exist a causal link between the breach of the State and the damage suffered by the persons affected.

See ROSS M., 1993, Beyond Francovich, *The Modern Law Review*, 56(1), 55-73.

Importantly, The Charter of Fundamental Rights and Francovich damages continues to apply specifically in the cases set out by EUWA 2018 Schedule 8, paragraph 39(3), as amended by Schedule 5, paragraph 56 (5) of the EUWA 2020.

1.3.3. The Trade and Cooperation Agreement

The Trade and Cooperation Agreement (TCA) is a free trade agreement concluded on 24th December 2020[60] involving the European Union and the United Kingdom[61]. This agreement has been provisionally applied from 1st January 2021 until 30th April 2021, so from 1st May 2021 it is full in force.

The purpose of the Treaty is already laid down in Article 1.

According to it, the TCA establishes the basis for the development of a cooperative and prosperous relationship between the EU and the UK, *"respectful of the Parties' autonomy and sovereignty."*

The desire for the British state to regain its sovereignty was indeed one of the main motivations behind the intention to leave the EU.

As a natural consequence, respect for the autonomy and independence of the Parties constitutes an essential feature of this Agreement.

The TCA, in terms of its structure, is divided into 7 Parts: Part One ("Common and institutional provisions"), Part Two ("Trade, transport, fisheries and other arrangements"), Part Three ("Law enforcement and judicial cooperation in criminal matters"), Part Four ("Thematic cooperation"), Part Five ("Participation in Union programmes, sound financial management and financial provisions"), Part Six ("Dispute settlement and horizontal provisions"), Part Seven ("Final provisions").

A crucial and very important issue addressed in the drafting of this Treaty clearly concerns the trade between the Parties, dealt with in Part Two.

In fact, before leaving the European Union, the UK enjoyed the benefits guaranteed by being part of the European single market, which translated into the free movements of goods, people, services and capital within the Member States.

As the UK is no longer part of the EU, its membership to the single market has clearly ceased as well, making it necessary to redefine all aspects of the commercial relationship between the two sides.

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[60] The Agreement has been clearly signed by both parties. In particular, in the UK the Queen signed the TCA on 31st December 2020, while, as for the European Union, the Council adopted the decision to sign the Agreement on 29th December 2020.
Initially the Agreement was provisionally applied until 28th February 2021, but this deadline was then extended at the request of the EU and therefore prolonged until 31st April. The underlying reason for this extension was related to the necessity to dispose of more time in order to complete the linguistic revision of the Agreement in all 24 languages.

[61] The Trade and Cooperation Agreement (TCA) concluded between the UK and the EU entered into force in the UK legal system by virtue of the European Union (Future Relationship) Act 2020 (FRA 2020), which received Royal Assent on 30th December 2020.

In particular, the search for an appropriate compromise between the needs for autonomy of the UK and the need to ensure continuity in the trade relations that strongly bind the Parties has led to the identification of a certain market configuration, certainly more favourable than the one that would have been emerged in a "no deal" scenario[62].

The TCA, indeed, preserves a tariff-free and quota-free area and prohibits the application on customs duties "*on all goods originating in the other Party*"[63].

Importantly, preferential tariff treatment does not apply to all goods moving between the parties, but only to those that satisfy the rules of origin laid down in the Treaty.

As will be seen in more detail in Chapter 3, meeting this requirement for businesses is not straightforward. The list of rules of origin for products turns out to cover more than 50 pages, which must therefore be read carefully in order to make sure whether or not the trade of a given good is indeed subject to the application of duties and tariffs.

Furthermore, for the UK, being a signatory to this Treaty, as mentioned above, is clearly not synonymous with belonging to the European single market. Although tariff liberalisation is provided for under certain conditions, there is still an obligation to comply with all customs procedures arising from the fact that the UK, as no longer part of the single market, is no longer part of the EU Customs Union.

Even in this case however the Agreement still provides simplification for traders, but there remains this customs obstacle, which will be analysed in depth in Chapter 3, that business will have to carefully consider.

In addition to the trade of goods (Part 2, Title I), Part 2 regulates, albeit more sparsely that in the goods section, the treatment of cross-border services and investments (Part 2, Title II).

Here, in fact, the treaty seems to limit itself to laying the groundwork for the subsequent implementation of further, more detailed treaties between UE-UK or between the UK and individual EU Member States.

In the area of investment, what makes this Agreement unique and different from recent EU agreements is the lack of an investor-state dispute resolution (ISDS) mechanism[64].

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[62] A no-deal scenario would have arisen if no trade treaty had been concluded between the UK and the EU. Specifically, in such a scenario the two sides would have had to negotiate and trade under WTO conditions, which indeed govern relations between countries with no trade agreements in place.
This would have resulted in the UK applying tariffs on European goods, and clearly vice versa, thus inevitably causing a major breakdown in trade relations.
Other problems would have arisen in relation to the UK's cherished fisheries sector, cooperation on security, the automotive sector, agriculture and more.
Further information on the consequences that could have been arisen in a no-deal scenario, available at BRAUTZSCH H. U., & HOLTEMÖLLER O., 2021, International trade barriers and regional employment: the case of a no-deal Brexit, *Journal of Economic Structures*, 10(1), pp. 1-25.

[63] Article 21, Part Two of the TCA.

[64] The TCA, as far as the protection of UK and EU investors is concerned, appears to have clear shortcomings, especially if one considers the investment protection provisions of other Treaties recently concluded by the EU,

This basically means that investors do not have the rights to individually file a complaint either through arbitration or through a permanent judicial system in investment matters.

In addition, the TCA does not have direct effect[65], thus preventing investors from invoking TCA provisions directly before national courts.

In addition to goods, services and investments, Part Two regulates other subjects and areas of interest to both parties, such as aviation and road transport, energy, competition, state aid and fisheries.

Apart from this, the Agreement also establishes, in Part 3, a new regulatory framework aimed at fostering cooperation between judicial authorities in criminal and civil matters and in particular *"in relation to the prevention, investigation, detection and prosecution of criminal offences and the prevention of and fight against money laundering and financing of terrorism"*[66].

The cooperation of the European and UK authorities in this Part is ensured with a view to guaranteeing a high level of protection to the citizens.

Moreover, in pursuing this aim, such cooperation must not prejudice but rather be based on the long-lasting commitment of both parties *"to ensuring a high level of protection of personal data"*[67].

Another important pillar regulated in this Agreement concerns the governance mechanism, set out in Part Six, envisaged to resolve disputes and ensure the correct application and interpretation of the Treaty.

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such as the Comprehensive Economic and Trade Agreement (CETA) with Canada or the Comprehensive Agreement on Investment (CAI) with China.

In this sense, the TCA contains provisions aimed at guaranteeing investors merely the application of the principle of non-discrimination and Most-favoured-nation (MFN), but de facto does not provide for any effective dispute resolution mechanism.

Accordingly, no Investor-state dispute settlement (ISDS) mechanism is established in this Treaty and, therefore, investment protection can only be conducted on a State-to-State basis, certainly not an attractive option for investor on either side.

See COLLINS D. A., 2021, Foreign Investment under the UK-EU Trade and Cooperation Agreement: Mitigating Punctuated Equilibrium in Legal Economic Dis-Integration, *Manchester Journal of International Economic Law*, 18(1), pp. 50-69.

The trade agreement mentioned above between Canada and the EU, known as the CETA, which provisionally entered into force on 21st September 2017, is certainly more comprehensive in terms of investment protection.

For instance, its revised text, set up a developed and updated ISDS system in order to ensure maximum transparency, guarantee judicial independence and an effective system for resolving investment disputes.

To achieve this, a permanent investment tribunal is established, which is no longer appointed on an ad hoc basis, as was the case under the traditional ISDS mechanism, but it is appointed in advance by the EU and Canada.

As previously stated, in addition to CETA, there are also many other Treaties concluded by the Union with countries such as Vietnam and China, which certainly present a more accurate and complete framework than the TCA, as far as the resolution mechanisms for the protection of investments are concerned.

See VAN HARTEN G., 2016, The European Union's Emerging Approach to ISDS: A Review of the Canada-Europe CETA, Europe-Singapore FTA, and European-Vietnam FTA, *U. Bologna L. Rev.*, 1, pp. 138-165.

[65] The TCA, indeed, does not confer any rights on individuals, and this is expressly stated in Part I, Title 2, Art. 5.

[66] Article 522 (1), Part Three of the TCA.

[67] Article 525 (1), Part Three of the TCA.

In particular, for the resolution of conflicts, first a period of consultation between the Parties is foreseen, with the aim of reaching a mutually agreed solution.

If this solution is not reached or, for example, if the Parties agree to avoid consultations, then the *"complaining Party may request the establishment of an arbitration tribunal"*[68].

The tribunal rulings are deemed to be legally binding and indeed if the *"arbitration tribunal finds that the respondent Party has breached an obligation under this Agreement"*[69], then that Party must immediately endeavour to comply with the Tribunal's Ruling, and if immediately is not possible, in a *"reasonable period of time"*[70].

Temporary remedies are also provided for in Article 749 and importantly, if a Party considers that the other one has failed in a serious and substantial way to fulfil any of the obligations described in Articles 763(1), 764(2) and Article 765(1)[71], that Party may decide to suspend or even terminate the operation of this Agreement[72].

What is peculiar to this governance mechanism is that it does not apply to the whole Agreement, i.e., to all provisions contained in its seven Parts. An exception is indeed Part 3 ("Law enforcement and judicial cooperation in criminal matters"), which refers for dispute resolution to a mechanism regulated in Part 3, Title XIII ("Dispute Settlement").

To draw a conclusive picture here, in the light of all the above considerations, the TCA does not seem to set strong conditions for the safeguarding of trade between the parties, although this was somewhat predictable considering especially the very short time available to the UK and the EU to conduct the negotiations for the conclusion of the TCA.

In particular the Agreement, in some of its parts, seems almost to be tending towards distancing and separation, rather that alignment, between the UK and the EU.

As seen before, for example, the Part on trade, especially on services and investments, clearly presents some deficiencies, which will need to be filled and developed in other treaties to be concluded later.

As far as the future scenario is concerned, it is therefore difficult to predict how the situation will evolve, whether this agreement will remain in force indefinitely or whether the relationship between the UK and UE will progressively deteriorate, following a possible desire, probably on the part of UK, to diverge even further from what was agreed in this Treaty.

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[68] Article 739, Part Six of the TCA.

[69] Article 746, Part Six of the TCA.

[70] Article 747, Part Six of the TCA.

[71] Articles 763 (1), 764 (1) and 765 (1) contained in Part Six are considered, according to Article 771, to constitute the "essential elements of the partnership established by this Agreement and any supplementing agreement."
In particular, Art 763 (1) concerns the defence of democratic principles and human rights, Art 764 (1) concerns the fight against climate change, while Art 765 (1) refers to the need to adopt measures to counter the proliferation of weapons of mass destruction.

[72] Article 772, Part Six of the TCA

CHAPTER 2

UK-EU trade: changes and amendments to the VAT rules following Brexit

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2.1 Introduction

The previous chapter analysed the legislative transition that inevitably took place in the UK on 1st January 2021, the date on which the European law ceased to be applicable and binding within the borders of the United Kingdom.

In order to facilitate that transition and to purse continuity of UK national law, it should be recalled that the EUWA 2018, subsequently amended by the EUWA 2020, introduced a new category of law, the "retained EU law".

However, notwithstanding the introduction of this new legal mechanism, through which EU law is preserved in domestic law from January 2021, the UK's exit from a community with such an extensive and established legislation has nevertheless led to the emergence of complexities and uncertainties in the new scenario post-Brexit, especially at the operational level, but this was practically inevitable.

British and European citizens, as a result, can no longer travel on the basis of the freedoms guaranteed by the Internal Market, but above all, companies operating within the UK have had to radically change the well-established operating methods that until 31st December allowed them to do business with companies operating in the Union or consumers residing there.
From 1st January 2021, in fact, the way in which trade is carried out between the UK and the UE has changed significantly in many respects.
In particular, one area of particular concern in the aftermath of Brexit is related to VAT, due to the fact that the EU VAT regime in the UK, which applied until the end of the implementation period, had to undergo major changes following the withdrawal of the UK from the Union.
The reason for this is that the EU VAT rules clearly apply and are binding only in the various EU Member States and, as already mentioned in the preceding chapter, the UK is to be considered as a third country from 1st January 2021.
That said, before analysing how the nature of transactions between the two parties, i.e., the UK and the EU, has changed with regard to the applicable VAT regime, it is necessary to first understand the origins of VAT and the reasons why this tax was introduced in the European Union.

2.2 Value Added Tax: Origins and evolution of legislation in the European Union

VAT is a general consumption tax, which has been regulated at EU level following the enactment of several European directives that have been transposed by Member States into their national legal system.
The legislative process that led to the birth, application and regulation of VAT as we know it today, however, was not an immediate and straightforward process.
Indeed, harmonisation in the field of indirect taxation proved to be complex and intricate from the outset, as the six founding States that in 1951 decided to sign the Treaty establishing European Coal and Steel Community (ECSC) presented profound differences in many aspects of their national legislation, including their taxation systems, which were not harmonised and aligned at all.
That said, this strong legislative discrepancy between the different founding States clearly could not remain then unchanged following the formation of the ECSC, as this fiscal divergence was no longer compatible with the strong ambition of these states to create a highly integrated common market.
In view of this, an important first step to initiate this harmonisation process was taken already in 1953, two years after the establishment of the ECSC.

In such year, indeed, a committee of experts, known as the Tinbergen Committee, was established by the High Authority of the European Coal and Steel Community[73].

The reason why this committee was set up, precisely, was to determine the potentially negative impact on the functioning of the common market resulting from the strong inhomogeneity that characterised the different turnover tax systems applied by the founding States.

The results of this analysis were then contained and expressed in a report, called the Tinbergen Report, which highlighted, for the first time in European history, that a harmonised system of taxation was necessary to ensure the effective pursuit of an integration process culminating in the establishment of a single European market.

Shortly after the publication of this report, the conclusions drawn by the committee's expert group inspired and were indeed implemented in the 1957 Treaty of Rome, which established the European Economic Community.

Article 99, contained in Part Three, Chapter 2 ("Tax Provisions") of the Treaty, stated that *"The Commission shall consider how the legislation of the various Member States concerning turnover taxes, excise duties and other forms of indirect taxation, [...], can be harmonised in the interest of the common market."*

According to such Article, it is clearly specified that the Commission was responsible for this task, which therefore, by virtue of this competence conferred by Art. 99, set up in the following years several working groups to assess whether the alignment of the different turnover taxes was really a prerequisite for the creation of a common market.

In 1962, in particular, a report was published, known as the Neumark report, which was of vital importance for the advent of EU VAT.

Indeed, it demonstrated that there was a need to abandon the cumulative turnover taxes in place in almost all Member States at the time, given the many recognised disadvantages associated with this system of taxation and to replace them with a general system of value added tax.

Five years after the publication of this report, therefore, the first two VAT directives were enacted, i.e., the First Council Directive 67/227/EEC[74] and the Second Council Directive 67/228/EEC.

[73] See DE LA FERIA R., 2009, The EU VAT system and the internal market, *IBFD*, 16, pp. 45-46.

[74] Member States were required to implement the First VAT Directive by 1st January 1970, so by that date the VAT system had to be introduced at national level. France, in particular, already had a VAT system in place, although some changes to it had to be implemented in order to bring it into line with what laid down in the First Directive. The other five Member States, however, were required to replace the turnover tax system then in place with a value added tax system. While Germany, Luxembourg and the Netherlands had no major problems in pursuing this change under the First Directive, Italy and Belgium experienced a more complicated situation and, as a result, the adoption of the VAT system inevitably came later.
See DE LA FERIA R., 2009, The EU VAT system and the internal market, *IBFD*, 16, p. 52.

In particular, the First Directive introduced, albeit in a rather general way, the distinctive and peculiar aspects of this new common system of VAT, which was supposed to replace the turnover taxes previously applied by most Member States.

Accordingly, Article 2 of the First Directive, defined this newly introduced tax as a tax on consumption *"proportional to the price of the goods and services, whatever the number of transactions which take place in the production and distribution process before the stage at which the tax is charged"*.

Another essential aspect still characterising this tax concerns its deductibility, which was also mentioned, although in a rather general and vague terms, in Article 2.

According to such Article, indeed, *"On each transaction, value added tax, [...] shall be chargeable after deduction of the amount of value added tax borne directly by the various cost components."*

As mentioned above, the First Directive limited itself to outlining and laying down the general characteristics of this new taxation system but, importantly, in Article 3 it also stated that *"The Council shall issue, on a proposal from the Commission, a second Directive concerning the structure of, and the procedure for applying, the common system of value added tax"*.

This Second Council Directive was therefore issued in 1967, the same year as the First, in order to determine the structure of this tax and to provide a more complete framework, although still very vague in some of its parts.

Such Directive, composed of 21 Articles, Annex A and B, introduced important concepts and aspects related to this consumption tax, such as, by way of example, the definition of taxable person, the categories of transactions subject to the tax, indication on VAT rates, and cases in which exemption was provided.

This directive, which was of a technical and operational nature, nevertheless left the Member States considerable autonomy as regards the concrete application and implementation of the VAT rules in their national legislation[75].

In the light of the above consideration regarding these two first directives, therefore, it soon became evident that they were clearly not suitable to provide and constitute a comprehensive regulatory framework for this complex fiscal subject.

Indeed, they presented problematic regulatory deficiencies and at the same time left too much autonomy to Member States.

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[75] For instance, Member States were free to decide on the structure and levels of the tax rates as Article 9 of the First VAT Directive, which dealt precisely with VAT rates, was not sufficiently accurate and detailed, but merely stated that *"the standard rate of value added tax shall be fixed by each Member State at a percentage of the basis of assessment which shall be the same for the supply of goods and for the provision of services."*
See DE LA FERIA R., 2015, Blueprint for reform of VAT rates in Europe, *Intertax*, 43(2), p.2.

In order to overcome these problems, i.e., to achieve a higher level of detail in the VAT legislation and to reduce the discretion previously granted to the different Member States, it became necessary and inevitable to adopt further European directives, such as the Sixth Council Directive 77/388/EEC, known simply as the Sixth VAT Directive[76].

Having said that, the Sixth VAT Directive in the years that followed its issue has not remained unchanged but, instead, has been the subject of numerous amendments made by subsequent directives because factors such as the advent of the internet, as well as disrupting everyone's daily lives, inevitably made it necessary to update the VAT rules then in force.

However, the consequence of these numerous changes also led to the formation of an extremely intricate, confusing and fragmented framework of legislation and that is why, in order to remedy this, in 2006, the European Council Directive 2006/112/EC[77] was issued, which entered into force on 1 January 2007.

Such directive, known also as "the VAT Directive", constitutes a sort of single text designed to render the VAT legislation produced up to that time more easily comprehensible and less fragmentary.

In particular, in order to achieve this aim, this Directive recasts the Directive 77/388/EEC ("Sixth Directive")[78], bringing together in a single legislative text the various measures contained and scattered throughout the different and numerous European directives[79].

Still to date, the 2006 Directive constitutes the reference source of EU VAT legislation.

[76] The Sixth Council Directive 77/388/EC repealed the First and Second VAT Directives, issued 10 years earlier, and thus provided a new and more orderly legal framework for EU VAT.
In particular, the Sixth Council Directive consisted of 38 Articles regulating different aspects of the Value Added Tax system such as, for instance, the scope (Title II), the place of supply of taxable transactions (Title VI), the taxable amount (Title VIII), rates (Title IX) or exemptions (Title X).
Relevantly, in terms of content, the Sixth Directive did not particularly differ from the Second VAT Directive, but the degree of detail of the rule was clearly greater, thus reducing the vagueness of the Second Directive.
For more information on the Sixth Council Directive 77/388/EC, see DE LA FERIA R., 2009, *The EU VAT system and the internal market* (Vol. 16). IBFD, pp. 55-56.

[77] The content and provisions of the European Council Directive 2006/112/EEC are divided into fifteen Titles: Title I (Subject Matter and Scope), Title II (Territorial Scope), Title III (Taxable Persons), Title IV (Taxable Transactions), Title V (Place of Taxable Transactions), Title VI (Chargeable Event and Chargeability of VAT), Title VII (Taxable Amount), Title VIII (Rates), Title IX (Exemptions), Title X (Deductions), Title XI (Obligations of Taxable Persons and Certain Non-Taxable Persons), Title XII (Special Schemes), Title XIII (Derogations), Title XIV (Miscellaneous), Title XV (Final Provisions).

[78] Directive 2006/112/EC refers to the recast of the provisions contained in Directive 77/388/EEC already in Whereas (1), according to which *"Council Directive 77/388/EEC of 17 May 1977 on the harmonisation of the laws of the Member States relating to turnover taxes — Common system of value added tax: uniform basis of assessment has been significantly amended on several occasions. Now that new amendments are being made to the said Directive, it is desirable, for reasons of clarity and rationalisation that the Directive should be recast."*
As for the legislative content of such recast, Whereas (2) establishes that "*The recast text should incorporate all those provisions of Council Directive 67/227/EEC of 11 April 1967 on the harmonisation of legislation of Member States concerning turnover taxes which are still applicable. That Directive should therefore be repealed."*

[79] See TERRA B., & KAJUS J., 2021, *A Guide to the European VAT Directives 2021*, IBFD, p. 24.

Importantly, in order to ensure a highly uniform implementation in the various Member States, this directive was also accompanied by an EU regulation, the Council Implementing Regulation 282/2011. The reason why this Regulation was placed alongside such Directive, precisely, was to *"ensure that application of the VAT system complies more fully with the objective of the internal market, in cases where divergences in application have arisen or may arise which are incompatible with the proper functioning of such internal market"*[80].

Having said that, the Directive 2006/112/EC has clearly not remained unchanged and untouched from 2006 to the present day but, inevitably, it has been amended on several occasions by other Directives in order to bring and keep the VAT rules up to date.[81]

In the light of the above, therefore, the Union's strong ambition to create a harmonised VAT system has not been translated into a simple and unhindered legislative process, but, more importantly, such process has not yet been completed.

Despite the important achievements since the 1950s, full harmonisation, indeed, has not yet been achieved and, precisely in order to strive for this difficult goal, EU VAT legislation continues and will continue, as seen above, to evolve and change over the years.

2.3 VAT rules in the UK until 31st December 2020: EU Council Directive 2006/112/EC

The preceding paragraph has highlighted and discussed the main stages and events that have marked the origin and evolution of VAT legislation in the European context starting from 1953, when the Tinbergen Committee first highlighted the need to pursue an intensive tax harmonisation process, up to the enactment of subsequent important directives including, by

[80] Council Implementing Regulation (EU) No 282/2011 of 15 March 2011, Whereas (2).
Importantly the 2006 VAT Directive has not been the first VAT Directive to be followed by a European Implementing Regulation.
In fact, also the Sixth VAT Directive was complemented by an EU Regulation, precisely the EU Council Implementing Regulation 1777/2005, with the aim of facilitating the interpretation and transposition by Member States of the measures contained in the Sixth VAT Directive.
Clearly, given their effectiveness, the EU has then continued to produce and issue EU Regulations to complement the VAT Directives, in order, as mentioned above, to ensure greater clarity and a greater degree of detail to certain provisions of the Directives.

[81] As an example of some of the amendments made to Directive 2006/112/EC, reference can be made to EU Council Directives 2017/2455 and 2019/1955, which together constitute the two main pieces of legislation of the "e-commerce VAT package".
The provisions of these two Directives aim to provide an updated legislative framework with regard to the VAT treatment of transactions qualifying as e-commerce. The reason why such a regulatory intervention was required can be identified in the fact that the sale of goods and services online has become extremely widespread in recent years and, therefore, it was necessary to produce and issue further Directive so as to amend and modernise the provisions of the VAT Directive.
The latter, indeed, came into force in 2006, at a time when e-commerce was clearly not as widespread and widely used as it is today.
For more information on the "e-commerce VAT package", see LAMENSCH M., 2018, Adoption of the e-commerce VAT package: the road ahead is still a rocky one, *EC Tax Review*, 27(4), pp. 186-195.

way of example, the Sixth Directive of 1977, but, above all, the so-called VAT Directive, i.e., EU Council Directive 2006/112/EC.

As seen, therefore, the European Union, in order to establish the VAT system and to pursue the fiscal harmonisation of this tax, has from the outset made extensive use of the legislative means of Directives, which, it should be recalled, require a domestic law in order to become applicable and effective in the national law of each Member State.

In line with this, the UK, too, clearly had to implement and enact a domestic measure in order to introduce EU VAT into its legislation.

Precisely in order to achieve this aim, i.e., to transpose the provisions contained in the First Council Directive 67/227/EEC and the Second Council Directive 67/228/EEC, the UK Parliament enacted the Finance Act 1972, which introduced the Value Added Tax system as of 1st January 1973, the date on which the UK joined the EEC.

In the years that followed then UK VAT law did not remain clearly unchanged.

As a Member State, the UK had to follow and adapt to the VAT regulatory developments decided by the EU, i.e., it had to continue to transpose into its own legislation all the other directives that followed over time, including of course the Council Directive 2006/112/EC which was implemented in the UK legal system by an Act called the Value Added Tax Act 1994 (VATA 1994).

That said, the 2006 VAT Directive clearly constituted also for the UK an indispensable legislative reference text for the regulation of VAT but, as mentioned in the previous chapter, the validity of EU law, and therefore also of EU directives, has inevitably undergone in the British national legal system some important changes following Brexit.

That is, by virtue of the withdrawal of the United Kingdom, EU law no longer finds application and validity in British domestic law but, in this respect, it should be recalled that the Withdrawal Agreement provides for the application of an implementation period and that, according to Article 127 (1) of the Agreement "*Union law shall be applicable to and in the United Kingdom during the transition period".*

Pursuant to Article 127 of the Withdrawal Agreement, the provisions contained in the EU Council Directive 2006/112/EC continued therefore to apply in the United Kingdom until 31st December 2020.

In light of this, in the following subparagraphs, i.e., from 2.3.1 to 2.3.4, the main and most important provisions of the EU Council Directive 2006/112/EC that were in force during the transitional period will be presented in order to clarify the VAT rules which applied and covered the transactions between the UK and the EU until 31st December 2020, since, as mentioned,

until that date the supply of services and the sale of goods between the UK and EU Member States were still regulated by the VAT Directive.

Subsequently, the new VAT rules governing UK-EU trade from 1st January 2021 will be analysed.

2.3.1 Intra-Community B2B trade of goods

Intra-Community acquisitions of goods are transactions carried out between two taxable persons at intra-Community level, which *"shall be subject to VAT"*[82] by virtue of Art. 2 of the VAT Directive.

In particular, such transactions are defined in Article 20 of European Council Directive 2006/112/EC, under which they are termed as *"the acquisition of the right to dispose as owner of movable tangible property dispatched or transported to the person acquiring the goods, by or on behalf of the vendor or the person acquiring the goods, in a Member State other than that in which dispatch or transport of the goods began".*

Having clarified this, the place of intra-Community acquisitions of goods is set out in Article 40 of the VAT Directive, according to which *"the place of an intra-Community acquisition of goods shall be deemed to be the place where dispatch or transport of the goods to the person acquiring them ends".*

In other words, Article 40 states that the country to which the goods are dispatched, rather than the country of production, is entitled to tax the transaction and thus apply the domestic VAT to the purchase and, so, basically the principle of taxation in the country of destination applies[83].

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[82] Article 2, Title I of the European Council Directive 2006/112/EEC.
In particular, Article 2 of the 2006 VAT Directive, states that shall be subject to VAT:
"(b) the intra-Community acquisition of goods for consideration within the territory of a Member State by:
(i) a taxable person acting as such, or a non-taxable legal person, where the vendor is a taxable person acting as such who is not eligible for the exemption for small enterprises provided for in Articles 282 to 292 and who is not covered by Articles 33 or 36;
(ii) in the case of new means of transport, a taxable person, or a non-taxable legal person, whose other acquisitions are not subject to VAT pursuant to Article 3(1), or any other non-taxable person;
(iii) in the case of products subject to excise duty, where the excise duty on the intra-Community acquisition is chargeable, pursuant to Directive 92/12/EEC, within the territory of the Member State, a taxable person, or a non-taxable legal person, whose other acquisitions are not subject to VAT pursuant to Article 3(1);"

[83] Article 40 of the European Council Directive 2006/112/EEC establishes that "*The place of an intra-Community acquisition of goods shall be deemed to be the place where dispatch or transport of the goods to the person acquiring them ends"*. According to it, therefore, the State with jurisdiction to tax the transaction is the state of destination, where the purchaser resides.
For the purpose of determining the place of supply of intra-Community acquisitions, however, it is relevant, in addition to the above-mentioned article, also Art. 41, pursuant to which *"Without prejudice to Article 40, the place of an intra-Community acquisition of goods [...] shall be deemed to be within the territory of the Member State which issued the VAT identification number under which the person acquiring the goods made the acquisition, unless the person acquiring the goods establishes that VAT has been applied to that acquisition in accordance with Article 40."*
This basically means that if the acquirer has not established the application of VAT in accordance with Art. 40, then the intra-community acquisition of goods will take place not only at the place where the transport or dispatch

In line with this, in order to ensure the transfer of tax liability in intra-Community trade, the reverse charge procedure[84] is applied, which, over the years, has proved to be an increasingly important instrument for preventing and countering tax fraud[85].

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ends, i.e., the state of destination (Art. 40), but also in the territory of the Member State where the acquirer has registered for VAT.
In practice, in order to avoid in any way that VAT is not levied and paid at all, Art. 41 deliberately creates a situation of double taxation, since, as seen above, the right to tax and levy VAT on intra-Community acquisitions would belong to two Member States and not only to the state of destination, where the goods are transported. This, of course, could only be the case if the acquiring company has the goods shipped to a Member State other than the one in which it is registered for VAT purposes.
By way of example, this situation could arise when a company registered in Germany purchases goods from an Italian company, but has them shipped not to Germany, but, instead, to France, where it has a warehouse.
At this point, to remedy the case where VAT is paid in both Member States, in the example above Germany and France, Art. 41 provides that *"If VAT is applied to the acquisition in accordance with the first paragraph and subsequently applied, pursuant to Article 40, to the acquisition in the Member State in which dispatch or transport of the goods ends, the taxable amount shall be reduced accordingly in the Member State which issued the VAT identification number under which the person acquiring the goods made the acquisition"*.
See VAN DOESUM, A., VAN KESTEREN, H, & VAN NORDEN, G., 2016, *Fundamentals of EU VAT law*, Kluwer Law International BV.

[84] In practice, under this procedure, the seller issues an invoice stating only the net value, i.e., the taxable amount of the goods to be dispatched or transported, without therefore indicating or charging the domestic VAT, in accordance with the destination principle established in Art. 40 of the VAT Directive.
The acquirer of the goods, then, supplements such invoice, meaning that the business entity receiving the invoice has to self-determine the domestic VAT rate to be applied, and must then record both the input and the output VAT in the VAT return.
It is the taxable person acquiring the goods that will therefore proceed with the payment of VAT in his own country but, at the same time, will deduct the same VAT amount, as provided for in Article 168.
See GRÁSGRUBER M., OTAVOVÁ M., & SEMERÁD P., 2013, Impacts of the application of the reverse charge mechanism of the value added tax, *Acta Universitatis Agriculturae et Silviculturae Mendelianae Brunensis*, 61(7), pp. 2133-2141.

[85] The reverse charge mechanism has its basis in European law and, in particular, in Directive 2006/112/EC and in some of its provisions, such as Article 199, which, in paragraph 1, lists the various sectors for which the reverse charge system is to be applied.
Paragraph 4 of the same Article, then, establishes that Member States, in order to apply this system to the transactions specified in paragraph 1, do not need prior authorization, but simply by virtue of paragraph 4, *"Member States shall inform the VAT Committee of national legislative measures adopted pursuant to paragraph 1"*.
Following the 2006 Directive, European Directive 2013/43/EU was issued on the subject of reverse charge, with the aim of amending, or rather supplementing the provisions of paragraph 1 of the Directive 2006/112/EC. In other words, in addition to the sectors, goods and services already listed in Article 199, Directive 2013/43/EU provided for the extension of the applicability of the reverse charge to other goods and services such as, for example, the sale of gaming consoles, the sale of cereals and the sale of mobile phones. The underlying reason for this, is to be found, in particular, in the increasingly frequent and massive tax fraud that over time was gradually involving other sectors than those originally provided for in paragraph 1 of Article 199.
Directive 2013/43/EU, in addition to supplementing the list of transactions provided for in paragraph 1, has also provided for greater information obligations for Member States, should they decide to apply the reverse charge mechanism.
A further EU Directive containing provisions of the reverse charge is the Council Directive 2013/42/EU of 22nd July 2013. The main purpose of such directive concerns the adoption of a Quick Reaction Mechanism (QRM), in order to tackle VAT fraud in a timelier manner. In fact, the Directive itself recognises this issue in Whereas (5), according to which *"Under the reverse charge provisions in Articles 199 and 199a of Directive 2006/112/EC, Member States do not have the flexibility to respond quickly to sudden and massive fraud in categories of goods and services falling outside the scope of those Articles"*. In order, therefore, to remedy and speed up the procedure for adopting the reverse charge mechanism in urgent cases, also for transactions that do not fall under paragraph 1 of Art. 199, Directive 2013/42/EU amends the 2006 Directive by inserting Article 199b. This Article, in paragraph 1, states that *"A Member State may, in cases of imperative urgency and in accordance with paragraphs 2 and 3, designate the recipient as the person liable to pay VAT on specific supplies of goods and services by derogation from Article 193 as a Quick Reaction Mechanism ("QRM") special measure to combat sudden and*

After the analysis of such relevant articles of the VAT Directive concerning various aspects of intra-Community acquisitions of goods, it is worth emphasising that every intra-Community acquisition is, of course, matched by an intra-Community supply, carried out by a vendor established in a Member State other than that of destination of the goods.

In line with this, if, as established, intra-Community acquisitions of goods shall be subject to VAT under Article 2 of the Directive, it follows that intra-Community supplies are inevitably considered to be exempt transactions for VAT purposes, under certain conditions stated in Art. 138[86], in the Member State of dispatch.

Relevantly, intra-Community supplies of goods are deemed to be exempt with a right to deduct VAT, according to Art. 169(b), i.e., the VAT paid by the supplier on goods or services used for the purpose of making the intra-Community supplies shall, except in specific cases, be deductible.

As mentioned, all the above legislation applied and regulated B2B trade in goods between the UK and any other Member State until the end of the implementation period.

Therefore, if the acquisition of goods took place, according to Art. 40, in the UK, then the transaction was subject to UK VAT, and this was accounted for by a double entry in the UK acquirer's VAT return, in application of the reverse charge mechanism.

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massive fraud liable to lead to considerable and irreparable financial losses". The procedure to activate the quick reaction mechanism by a Member State is specified in paragraph 2 of Art 199b.

For more information on the Reverse Charge Mechanism and on its legislative updates, see DE LA FERIA R, 2019, The new VAT general reverse-charge mechanism, *EC Tax Review*, pp. 1-5.

[86] Article 138(1) of the 2006 Directive, as initially enacted, stipulated that "*Member States shall exempt the supply of goods dispatched or transported to a destination outside their respective territory but within the Community, by or on behalf of the vendor or the person acquiring the goods, for another taxable person, or for a non-taxable legal person acting as such in a Member State other than that in which dispatch or transport of the goods began"*. The aforementioned Article 138(1) has not remained untouched to date as it has been amended by Directive 2018/1910, issued in order to harmonise and improve the VAT system in intra-community transactions.

In particular, such Directive, amends Article 138(1) by providing that, in addition to what was originally provided for in the 2006 VAT Directive, an intra-EU supply in order to be exempt must meet a further requirement, namely that *"the taxable person or non-taxable legal person for whom the supply is made is identified for VAT purposes in a Member State other than that in which the dispatch or transport of the goods begins and has indicated this VAT identification number to the supplier"*. In addition to this, the Directive 2018/1910 also inserted a new paragraph to Art. 138, namely paragraph 1a., which establishes another condition that must be fulfilled to exempt the supply. This second condition relates to the obligation on the supplier to issue a recapitulative statement and to indicate therein certain information, i.e., those listed in Art. 264.

The purpose of the amendments made to Art. 138, in particular, is to strengthen the fight against tax fraud and this is pursued, through the Directive 2018/1910, by imposing the conditions set out above, which must necessarily be met for the application of the exemption to the intra-EU supply. In other words, the acquirer's VAT identification number and its inclusion in the VAT Information Exchange System (VIES) become a substantive requirement for the exercise of the exemption, instead of a purely formal requirement as initially foreseen in the case law of the CJEU.

See WDOWCZYK-SZPYTMA E., 2018, The EU VAT system–the importance of the "Quick fixes", simplifications in force as from 1 January 2020, *Kwartalnik Prawa Podatkowego*, 3, pp. 73-74.

2.3.2 Intra-Community B2C trade of goods

The Council Directive 2006/112/EC, as well as regulating B2B goods transactions, also provides a clear framework for the regulation of intra-EU B2C trade of goods.

Specifically, when the UK was still part of the European Union, the place of intra-EU B2C supplies of goods was referred to in Articles 33 and 34 of the Council Directive 2006/112/EC, Title V (*Place of Taxable transactions*).

Article 33, in particular, as in force during the implementation period, established that derogating from Article 32[87] the place of supply of intra-Community B2C sales *"shall be deemed to be the place when dispatch or transport to the customer ends"*[88].

The principle of taxation in the country of destination had therefore to be applied, provided that the goods were transported by or on behalf of the seller to a Member State other than that of departure.

Moreover, in order for the destination principle to be applied, the goods transacted had also to be *"neither new means of transport nor goods supplied after assembly or installation, with or without a trial run, by or on behalf of the supplier"*[89].

Article 34 (1), however, provided that Article 33 did not apply, and thus taxation took place in the Member State of supply, in cases where the amount of the supplier's sales concluded in a different Member State did not exceed the sum of €100,000 in either the current or the preceding calendar year.

Article 34 (2), then, further specified that this protection threshold of €100.000 could be reduced to a minimum of €35.000 at the discretion of the various Member States[90].

Under the combined provisions of Article 33 and 34, it was therefore set up a particular regime, aimed at avoiding market and competition distortions[91], which applied to intra-Community

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[87] Article 32 of Directive 2006/112/EC lays down the general rule on the place of taxation for supplies of goods with transport. The same Article, indeed, states that the place of supply of such a transaction, where goods are transported by the seller, the costumer or by a third party, should be the place where the goods are located at the time when the transport begins.

Article 33, however, derogates from what is established in Art. 32 and provides that the taxation and charging of VAT shall take place in the country of destination of the goods, if the supply meets certain conditions laid down in Art. 33.

[88] Article 33 (1), Title V (Place of taxable transactions) of the EU Council Directive 2006/112/CE.

[89] Article 33 (1), Title V (Place of taxable transactions) of the EU Council Directive 2006/112/CE.

[90] By virtue of the Article 34 (1), the transposition of the European Council Directive 2006/112/EEC led the individual EU Member States to establish a protection threshold ranging from € 35.000, adopted by most states, to € 100.000.

In particular, when the UK was still part of the EU, of the 28 total Member States, 16 adopted a protection threshold of €35.000 while Luxembourg, Germany and the Netherlands applied the maximum threshold provided for in Art. 34, i.e., €100.000.

Data found on the official website of the European Commission: https://ec.europa.eu/info/index_en [Accessed 03/01/2022].

[91] Under this distance selling regime, according to Art. 33, the distance sales are taxable for VAT purposes, as a general rule, in the Member State of destination.

distance sales of goods made between the UK and any other Member State prior to the end of the implementation period[92].

As an example of what has been stated above, consider the case where a British company during 2020 sold goods, which were dispatched by or on behalf of the supplier, to a Spanish final consumer.

In this transaction, which qualified as an intra-Community distance sale of goods, the VAT to be applied, pursuant to Art. 33, was that of the country of destination, which in this case is Spain.

To this end, the British company had to proceed with the identification for VAT purposes in Spain and thus fulfil all the various obligations relating to the payment of the tax.

In accordance with Article 34, however, if the British taxable person had not exceeded the threshold applied in Spain, which was equivalent to € 35.000, identification in Spain was no longer required since in this case the VAT of the country of the supplier, i.e., the UK VAT, had to be charged.

2.3.3 Importation of goods

Up to this point, the VAT treatment of intra-Community transactions has been presented and introduced, both for B2B transactions, in subparagraph 2.3.1, and for B2C transactions in subparagraph 2.3.2.

Importantly, however, the VAT Directive does not only deal with transactions of an intra-Community nature but also regulates the VAT regime of transactions involving a Member State, i.e., the UK until 31st December 2020, and a non-EU country, which may qualify as imports or exports.

That said, Article 2 of the VAT Directive, first of all, establishes that importation of goods shall be subject to VAT[93], while as regards exports, Art. 146 (1), in point a), expressly states that

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This is necessary in order to avoid the market and competition distortions that would occur if the taxation at origin was applied, in view of the significative divergence characterising the VAT rates of the various Member States.
However, if the sales volumes are limited, i.e., below the thresholds laid down in Art. 34, no risk of distortion arises and therefore, below the thresholds set by each Member State, the transaction is deemed to be taxed for VAT purposes in the country of the supplier.
Notably, If the threshold is not exceeded, the supplier may still proceed with VAT identification in the Member State of destination and such possibility is provided for in Article 34, paragraph 4, according to which *"The Member State within the territory of which the goods are located at the time when their dispatch or transport begins shall grant those taxable persons who carry out supplies of goods eligible under paragraph 1 the right to opt for the place of supply to be determined in accordance with Article 33"*.

[93] Importantly, on 31st December 2020, when the EU law still applied in the UK, there was in place in the EU the so-called Low Value Consignment Relief (LVCR), which basically meant that it was not necessary to pay VAT on importation for goods of modest value, i.e., not exceeding €22,00.
In other words, a VAT exemption was provided for in these cases.
Specifically, the Low Value Consignment Relief was established in Art. 23 of the EU Council Directive 2009/132/EC, according to which *"Goods of a total value not exceeding EUR 10 shall be exempt on admission.*

"the supply of goods dispatched or transported outside the Community by or on behalf of the vendor", i.e., exportations of goods, should be subject to VAT exemption by the Member States.

As regards the determination of the place of importation of goods, Art. 60 of the VAT Directive establishes that "*the place of importation of goods shall be the Member State within whose territory the goods are located when they enter the Community"*.

According to Art. 60, therefore, the UK VAT was due on importation provided that the point of entry of the goods into the Community was actually located in the United Kingdom.

In order to correctly determine the place of importation, however, Article 61 should also be taken into account.

Art. 61, indeed, by way of derogation from Art. 60 cited above, provides that when imported goods, *"which are not in free circulation",* enter the territory of the Community under a suspensive customs arrangements[94], such as customs warehousing or transit, then the place of importation is no longer the point of entry into the Union, but rather *"the place of importation of such goods shall be the Member State within whose territory the goods cease to be covered by those arrangements or situations"*.

Accordingly, if goods from a third country entered, prior to the end of the implementation period, the EU in the Netherlands but were placed under the external Union transit arrangement in order to reach their final destination in the UK, then the place of importation was no longer the Netherlands, but rather the UK, i.e., the Member State where the goods left the suspensive custom arrangement.

As regards the identification of the person liable to pay VAT, Art. 201 of the VAT Directive states that the person liable for payment of VAT on importation shall be *"any person or persons designated as liable by the Member State of importation"*.

In case the person liable is a taxable person, then the import VAT becomes deductible, but only on condition that the imported goods are used for the purposes of his taxable transactions.

Member States may grant exemption for imported goods of a total value of more than EUR 10, but not exceeding EUR 22".

Relevantly, it is appropriate to mention that the Low Value Consignment Relief was then abolished in the EU on 1st July 2021, but this will be addressed later in section 2.6.1.

[94] In particular, Article 61, as regards suspensive customs arrangements, primarily refers to those mentioned in Art. 156 of the VAT Directive and, so, to the temporary storage, free warehouse, customs warehousing arrangements or inward processing arrangements.

In addition, Article 61 also mentions temporary importation arrangements with total exemption from import duty and external transit arrangements.

In other words, if the goods imported into the EU are placed under one of these arrangements, then the rule provided by Art. 60 does not apply.

For more information on the various customs procedures mentioned above see DOROŻYŃSK T., & ŚWIERKOCKI J., (Ed.), 2016, *Practical aspects in Doing International Business*, Łódź University Press, pp. 151-163.

As mentioned, the EU VAT rules presented above also covered the VAT treatment of the UK's trade in goods with a third country until 31st December 2020.

2.3.4 Supply of services in the EU

In addition to the supply of goods, VAT is also levied on the supply of services, as is also laid down in the VAT Directive and in particular in Art. 2 (c), which states that *"the supply of services for consideration within the territory of a Member State by a taxable person acting as such"* represent a transaction which shall be subject to VAT.

Having established this, the general rules concerning the place of supply of services are laid down in Articles 44 and 45 of the VAT Directive, which also applied and constituted the regulatory reference for the UK until 31st December 2020.

Article 44 essentially concerns B2B transactions and establishes that the place of supply of services to a taxable person *"shall be the place where that person has established his business"*[95].

Article 44 then continues by stating that if this taxable person, however, receives these services in a fixed establishment located in a different place from where his business his established, then in this case the place of supply shall be deemed to be the place where the taxable person has his fixed establishment[96], i.e., where the services are effectively received.

In case the place of establishment or fixed establishment is absent, then the *"place of supply of services shall be the place where the taxable person who receives such services has his permanent address or usually resides"*[97].

In other words, for B2B supplies of services the taxation at destination applies.

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[95] Council Implementing Regulation (EU) No 282/2011, Article 10 defines, with reference to the application of Art. 44 and 45 of the VAT Directive, what is to be intended by the place where a person has established his business. Article 10 of the Regulation, in particular, states that the "*the place where the business of a taxable person is established shall be the place where the functions of the business's central administration are carried out."* In order to determine this, as stated in Art. 10(2), consideration must be given to the *"place where the essential decisions concerning the general management of the business are taken, the place where the registered office of the business is located and the place where management meets"*.

If these criteria do not allow to define the place of establishment with certainty, then the place where essential business decisions are made should take precedence.

[96] Council Implementing Regulation (EU) No 282/2011, Article 11 defines, with reference to the application of Art. 44 of the VAT Directive, what is meant by *"fixed establishment*". In particular, Art. 11 states that a fixed establishment *"shall be any establishment, [...], characterised by a sufficient degree of permanence and a suitable structure in terms of human and technical resources to enable it to receive and use the services supplied to it for its own needs."*

[97] Art. 45 of the Council Directive 2006/112/EC.

In particular, the term *"permanent address"* and the place where a person *"usually resides"* are referred to, respectively, in Articles 12 and 13 of the Council Implementing Regulation (EU) No 282/2011.

According to Art. 12, the *"permanent address of a natural person, [...], shall be the address entered in the population or similar register, or the address indicated by that person to the relevant tax authorities, unless there is evidence that this address does not reflect reality."*

The place where a person *"usually resides"*, instead, referred to in Art. 13 of the Council Implementing Regulation, is deemed to be *"the place where that natural person usually lives as a result of personal and occupational ties."*

In line with this, by way of example, if a UK company in 2020 provided a generic service to a company established in Spain, then Spanish VAT had to be charged here and this had to be done by the Spanish company through the use of the reverse charge mechanism, previously mentioned in paragraph 2.3.1.

Art. 45, in turn, lays down the general rule for the supply of services in the case where these are supplied to non-taxable persons and, so, in a B2C transaction.

According to Art. 45, in particular, the place of supply of services, when supplied to a non-taxable person, *"shall be the place where the supplier has established his business"* and, therefore, the taxation in this case occurs in the Member State of origin, rather than in the country where the consumer resides.

It is important to emphasise that the rules described above, laid down in Articles 44 and 45, are general rules which do not apply to all services.

There are, in fact, some specific categories of services, specifically mentioned and listed in Articles 46 to 58 of the VAT Directive, to which distinct and peculiar rules on the place of supply apply.

Among these services, to which specific rules apply, are also telecommunications, broadcasting and electronic (TBE) services[98] to non-taxable persons, which deserve a particular attention in that the EU VAT rules applicable to such services have undergone several and important amendments which will be discussed below.

First of all, as from 2015, the place of supply of TBE services, when provided to a non-taxable person (B2C) in the Union, has been identified in the country of destination, i.e., the place where the customer is established, thus derogating from the general rule set out in Art. 45 of the VAT Directive[99].

As a result, by way of example, a UK company offering TBE services to consumers in Spain, Belgium and Italy would have to identify itself for VAT purposes in each of these Member States because of the taxation at destination and, of course, this would have meant incurring compliance costs.

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[98] With particular regard to the definitions of TBE services, first telecommunications services are defined in Art. 24(2) of the VAT Directive and, moreover, Article 6a (1) and (2) of the Council Implementing Regulation (EU) No 282/2011 express a list, non-exhaustive, of examples of services which do or do not fall within the definition contained in Art. 24(2) of the VAT Directive.

Broadcasting services, instead, are defined in Art. 6b of the Council Implementing Regulation and a non-exhaustive list of examples of such services are contained in Art. 6b (2) of the Implementing Regulation.

Article 7 of the Implementing Regulation defines what electronic services are, while Art. 7(2) contains a non-exhaustive list of examples of such services which fall under the definition provided for in Art. 7.

[99] See BRAILSFORD M., 2014, Big VAT changes for B2C supply of e-services in the EU, *Journal of Direct, Data and Digital Marketing Practice*, 16(2), pp. 144-145.

To avoid this, and thus to facilitate the collection and payment of VAT for TBE services, in the same year an optional system called Mini One-Stop-Shop (MOSS) was introduced in the Union. In practice, trough the MOSS scheme, a qualifying taxable person needed to register in only a Member State, referred to as the Member State of identification, to which that taxable person had to pay quarterly the VAT due[100] to the different Member States where the TBE services were supplied to.

It was then up to the tax authority of the Member State of identification, and not to the taxable person itself, to transmit the VAT collected to the various Member States of destination, to which this VAT was due.

That said, another important regulatory change, with reference to the place of supply of TBE services, has also been introduced in 2019 in order to benefit, especially, small enterprises.

In fact, as of 1st January 2019, it has been provided that the place of supply of TBE services, when provided to non-taxable persons in the EU, could be identified in the Member State of the supplier and not, therefore in the Member State of destination, as provided for in 2015.

Taxation in the country if the supplier, however, applied exceptionally and only if determined conditions, mentioned below, were met.

Specifically, if a supplier established in one Member State, i.e., the United Kingdom until 31st December 2020, supplied TBE services to non-taxable persons located in other Member States and such supplies did not exceed a threshold equal to € 10,000 in the preceding and the current year, then such supplier could opt[101] to apply and charge its domestic VAT rates and so in such case no identification was needed in the different Member States of consumption.

Clearly, the taxation in the Member State of supply applied only if such a threshold was not exceeded, meaning that, vice versa, if such a threshold was exceeded then the supplier had to proceed with VAT identification in the various Member States of destination, or alternatively, could opt to use the MOSS[102].

In the latter case, as previously stated, only a VAT registration was required.

During the implementation period, therefore, these were the rules applied at EU level and also in the UK.

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[100] Importantly, the VAT due when using the MOSS scheme is to be calculated considering the tax rates of the different Member States of consumption.

[101] If the € 10,000 threshold is not exceeded, as said, the supplier of TBE services can apply the origin VAT, instead of charging the VAT rates of the different Member States of consumption.
The supplier, however, even if the threshold of € 10,000 is not exceeded in the previous and current year, may still choose to opt for the application of the system of taxation at destination, thus applying the VAT rates of the various Member States of consumption and therefore also having to proceed with VAT identification in each of these states.

[102] For more information on the new rules introduced in 2019 with regard to MOSS and TBE services, see PAPIS-ALMANSA M., 2019, VAT and electronic commerce: the new rules as a means for simplification, combatting fraud and creating a more level playing field?, *Era Forum*, *20(2)*, pp. 205-207.

That is, there were general rules, laid down in Articles 44 and 45 of the Directive, and then special rules which derogated from the principles of territoriality established by the general rules.

In addition, with specific regard to the supply of TBE services to final consumers in the EU, UK businesses were clearly entitled to join the MOSS in order to achieve the significant simplifications provided for by this scheme.

2.4. UK-EU: VAT treatment of the ongoing transactions

In the preceding paragraph it has been stated that until 31st December 2020 the EU law continued to apply in the United Kingdom by virtue of the Art. 127 (1) of the Withdrawal Agreement.

No major problems have therefore arisen for traders in relation to the VAT rules applicable to cross-border transactions of goods concluded between the UK and any other Member States before the end of the implementation period.

In this case, in fact, if the dispatch of the goods and their receipt by the customer both occurred before 31st December 2020, then the provisions of the Council Directive 2006/112/EC applied.

Having clarified this, however, there have also been cases where an EU trader shipped goods in December 2020, but these arrived at the UK customer in 2021 or later, i.e., when the UK had already become a fully-fledged third country[103].

Clearly, these situations, at least initially, were characterised by a greater degree of uncertainty as the goods were subject only at the time of dispatch to the intra-Community regime provided for by the EU VAT Directive.

In order to remedy this and to solve the problems that might have arisen with regard to these ongoing operations, the Withdrawal Agreement provided a solution in Art. 51 (1).

Specifically, according to such Article *"Council Directive 2006/112/EC shall apply in respect of goods dispatched or transported from the territory of the United Kingdom to the territory of a Member State, and vice versa, provided that the dispatch or transport started before the end of the transition period and ended thereafter"*.

According to what has been established here, therefore, the VAT Directive not only applies until 31st December, but may also continue to regulate certain transactions concluded between a Member State and the UK after the implementation period.

What is important, however, is that these operations must comply with the conditions set out in Art. 51 (1), i.e., that the goods are transported from the UK to another Member State or vice

[103] Clearly the same issue also applied the reverse case, i.e., where the shipment of goods started before 31st December 2020 in the UK and ended in 2021 in an EU Member State.

versa, but above all that the transport began before 31st December 2020 and ended after this date.

As a way of example, consider the case of a UK business which dispatches goods to a France taxable person, where the dispatch started in December 2020 but ended in January 2021.

In such a scenario, according to the Withdrawal Agreement, the VAT treatment of the transaction is still regulated by the EU Council Directive 2006/112/EC and the place of taxation, therefore, is identified in the Member State of destination according to Art. 40 of the VAT Directive.

Relevantly, Article 51 (1) also contributed to define the VAT treatment of transactions concluded between UK and EU traders under call-off stock arrangements.

Specifically, at intra-Community level this contractual arrangement is regulated by Article 17a of the VAT Directive[104] and is essentially based on the transfer of goods, owned by the supplier, from one Member State to a warehouse of the customer in another Member State.

The customer can then decide in every moment, according to its productive or commercial needs and within a maximum limit of twelve months, to carry out the withdrawal of the goods from this warehouse.

The peculiarity, importantly, is that according to Article 17a the transaction described above is deemed to take place not at the time when the dispatch of the goods begins, but, instead, only at the moment when the customer picks up the goods from the warehouse, i.e., only at this moment does the transfer of the ownership rights over the goods take place.

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[104] Relevantly, Article 17a was inserted in the VAT Directive by the Council Directive 2018/1910 in order to pursue greater harmonisation at EU level of the call-off stock tax regime.
Prior to the issue of the Council Directive 2018/1910, indeed, call-off stock gave rise, as a general rule, to an "assimilated" supply in the Member State of departure of the goods and an "assimilated" intra-Community acquisition in the Member State of the purchaser.
These transactions were then followed by a domestic supply in the purchaser's Member State and therefore, by virtue of this, an obligation arose on the part of the seller to proceed with registration for VAT purposes in the Member State of destination of the goods.
See CANO M. C., 2020, Suppliers Adapt to Achieve VAT Benefits of EU Call-off Stock Rules, *Int'l Tax Rev.*, 31(2), p. 13.
The tax treatment described above, however, did not find application in all Member States since in some specific cases, in order to provide simplifications, some national legislation allowed such transactions to be treated as normal intra-Community transactions and therefore did not require the supplier to register for VAT purposes there.
It was precisely because of this discrepancy, i.e., that only some Member States provided such simplification, that the need to pursue a uniform and harmonised legislation arose which, as mentioned above, was achieved with the enactment of the Council Directive 2018/1910.
With the insertion of Article 17a, in fact, it has been expressly provided that the call-off scheme, provided that certain conditions are met, gives rise to a normal intra-Community transaction which takes place at the moment when the purchaser removes the goods from the warehouse where they are stored.
In the light of the above, therefore, the new intra-Community rules on call-off stock effectively remove the obligation on the supplier to open a VAT number in the Member State of destination of the goods.
For further information on the EU current call-off stock rules, see WDOWCZYK-SZPYTMA E., 2018, The EU VAT system–the importance of the "Quick fixes", simplifications in force as from 1 January 2020, *Kwartalnik Prawa Podatkowego*, 3, pp. 83-90.

That said, provided that certain conditions laid down in Art. 17a (2) are met[105], such transactions are to be treated as ordinary intra-Community transactions, i.e., a VAT-exempted supply, pursuant to Article 138(1) of the Directive, *"shall be deemed to be made by the taxable person that dispatched or transported the goods either by himself or by a third party on his behalf in the Member State from which the goods were dispatched or transported"*[106] while the purchase is to be treated as an intra-Community acquisition of goods *"made by the taxable person to whom those goods are supplied in the Member State to which the goods were dispatched or transported"*[107].

Having clarified the intra-Community regime governing call-off stock transactions and given that, after 31st December 2020, transfers of goods between the UK and any Member State give rise to imports and exports, a concern clearly arose among traders as to whether they could continue to apply the EU VAT regime described above to transactions straddling 31st December 2020 i.e., in the specific case where the goods were dispatched in 2020 but then removed from the warehouse by the acquirer in 2021.

In order to clarify and remedy this, the VAT Committee provided important clarification at its 117th meeting in March 2021, in that it basically established that also call-off stock transactions fall within the scope of Agreement 51(1) of the Withdrawal Agreement and, therefore, only if the goods are shipped before 31st December 2020 under a call-off stock agreement from the UK to the EU, or vice versa, the Union regime described above continues to apply, even if the transaction is deemed to take place in 2021, i.e., when the goods are removed from the warehouse by the acquirer[108].

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[105] Article 17a (2), inserted in the VAT directive by Directive 2018/1910, sets out the conditions that must be fulfilled for a call-off stock contract to be deemed to exist.
Specifically, it is established that *"For the purposes of this Article, call-off stock arrangements shall be deemed to exist where the following conditions are met:*
(a) goods are dispatched or transported by a taxable person, or by a third party on his behalf, to another Member State with a view to those goods being supplied there, at a later stage and after arrival, to another taxable person who is entitled to take ownership of those goods in accordance with an existing agreement between both taxable persons;
(b) the taxable person dispatching or transporting the goods has not established his business nor has a fixed establishment in the Member State to which the goods are dispatched or transported;
(c) the taxable person to whom the goods are intended to be supplied is identified for VAT purposes in the Member State to which the goods are dispatched or transported and both his identity and the VAT identification number assigned to him by that Member State are known to the taxable person referred to in point (b) at the time when the dispatch or transport begins;
(d) the taxable person dispatching or transporting the goods records the transfer of the goods in the register provided for in Article 243(3) and includes the identity of the taxable person acquiring the goods and the VAT identification number assigned to him by the Member State to which the goods are dispatched or transported in the recapitulative statement provided for in Article 262(2)."
[106] Article 17a (3), Title IV of the EU Council Directive 2006/112/EC.
[107] Ibid.
[108] Significantly, a different discipline applies, however, to the return of goods after 1st January 2021 under a call-off stock contract, on which issue the European Commission has also commented in order to provide greater legal clarity.

In the light of the above, Article 51 (1) made it possible to give legislative and commercial continuity to EU-UK ongoing transactions since if the transport started before 31st December 2020, then the EU VAT rules still applied.
However, despite this simplification, traders still have to bear the burden of proving the date on which the transport or dispatch actually began[109].
Having established what is laid down in Article 51(1), Article 51(2) then establishes, as a general rule, that "*Directive 2006/112/EC shall continue to apply until 5 years after the end of the transition period with regard to the taxable person's rights and obligations in relation to transactions with a cross-border element between the United Kingdom and a Member State that took place before the end of the transition period and with regard to transactions covered by paragraph 1.*"
In other words, Article 51(2) basically sets out the deadline by which the EU Council Directive 2006/112/EC can continue to apply to regulate the ongoing transactions involving the UK and another Member State.
As stated, the rule just described is a general rule and exceptions to it are provided for in Article 51 itself.
Paragraph 3, indeed, *"by way of derogation to paragraph 2"*, establishes that refund applications relating to VAT paid in 2020 in a Member State by a UK taxable person or, conversely, paid in the UK by an EU taxable person, shall be submitted[110] in accordance with the conditions laid down in Directive 2008/9/EC *"at the latest on 31 March 2021"*.

Indeed, if the goods were to be returned after 1st January 2021, such an operation would result in the goods being subject to customs control at the time of crossing the border as this movement is to be considered as an export or an import.
Consider, for example, the case where a supplier established in Italy sends goods under a call-off stock contract to a UK customer before 31st December 2020, but later, in 2021, those goods are returned and are then re-imported into the territory of Italy.
In this case, the transaction is an export of goods from the UK and an import of goods into the member state where the goods originally departed, i.e., Italy, and the importation should also be exempt from VAT provided that the requirements of the VAT Directive in Article 143(1) (e) are met.
For more information on documentation requirements and the tax treatment of returns of goods under a call-off stock agreement after Brexit, see GIULIANI G., & SPERA M., 2021, Brexit: impatto sul regime fiscale dei resi, *Il Fisco*.
[109] As mentioned, a UK or EU operator must prove that the start of the transport took place before the end of the implementation period in order to benefit from the simplifications provided for in Art. 51 (1) of the Withdrawal Agreement.
That said, obviously, the documents proving the commencement of the shipment vary according to the type of goods or the type of transport chosen.
[110] As regards the way in which the applications must be submitted, a taxable person established in one EU Member State or in the UK could, therefore, still use the electronic portal set up by his state of establishment, in accordance with Article 7 of Directive 2008/9/EC, in order to submit a refund application for VAT paid before the end of the implementation period.
Relevantly, by virtue of Art. 51(3) of the Withdrawal Agreement, such a request must be submitted at the latest on 31st March 2021.

As far as refunds for VAT paid in 2020 are concerned, therefore, the EU directive continued to apply until the final date of 31st March 2021, and not up to 5 years as stipulated in Article 51(1)[111].

A further and final derogation from paragraph 2 is then provided for in paragraph 4 of the same Article, which indeed states that *"By way of derogation from paragraph 2 [...], amendments to VAT returns that were submitted in accordance with Article 364 or Article 369f of Directive 2006/112/EC either in the United Kingdom with regard to services supplied in Member States of consumption before the end of the transition period, or in a Member State with regard to services supplied in the United Kingdom before the end of the transition period, shall be submitted at the latest on 31 December 2021."*

Essentially, the above-mentioned Article refers to the VAT returns submitted for the supply of TBE services under the MOSS regime and stipulates that the amendments to these declarations had to be made within the deadline of 31st December 2021.

2.5 1st January 2021: new Import VAT regime in the UK

In accordance with the provisions of Article 127 (1) of the Withdrawal Agreement, EU law ceased to apply in the UK on 1st January 2021.

If, therefore, until this date the UK VAT legislation had to be brought in line with the legislation produced at European level, from 1st January 2021 this obligation ceases to apply.

In other words, as of this date, the UK is freed from the obligation to transpose the EU directives which, essentially, means that the United Kingdom has regained autonomy and sovereignty over the regulation of this tax[112].

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[111] As regards refunds for VAT paid in 2021 in Great Britain by an EU taxable person, it is important to note that, as mentioned, the provisions of the VAT Directive 2008/9/EC no longer apply, and therefore it will no longer be possible to use the electronic portal set up at European level.
In the light of this, taxable persons established in the EU have rather to apply directly to HMRC and request a refund of the VAT paid in Great Britain by completing the form VAT65A.
Clearly, also the procedures for the refund of VAT paid in 2021 in a Member State by a UK business has undergone some major changes, since, as mentioned above, the application of Directive 2008/9/EC has ceased in favour of the Thirteenth Directive, which regulates precisely the refunds of VAT paid in the EU by a taxable person established in a non-EU country, such as the United Kingdom from 1st January 2021.
UK businesses will therefore have to deal with multiple VAT jurisdictions and comply with the conditions set by each individual Member State in order to obtain refunds for the VAT paid in 2021.
Relevantly, it is important to note that different rules apply with reference to refunds of VAT paid in Northern Ireland by a taxable person established in the EU, or vice versa, and this will be treated specifically in section 2.8.1.

[112] By way of example, in several provisions of the Taxation (Cross-border Trade) Act, also known as TCBTA 2018, the United Kingdom already exercised this recovered legislative autonomy and sovereignty, by amending part of the EU regulatory system imported into the British legal system as of 1st January 2021.
Indeed, it is first of all important to recall that as of this date, several European laws continued to find validity in the UK legal system, by virtue of the new category of laws called "retained EU law", introduced by the EUWA 2018.
Clearly, while this provided continuity to the UK VAT code, it also undoubtedly represented a clear erosion of parliamentary authority.

Having said that, 1st January 2021 also represents the first day from which, inevitably, changes to the VAT rules governing trade between the UK and the various Member States have taken place.

As of this date, indeed, the UK has become a fully-fledged third country and this, essentially, entails that supplies of goods made between the United Kingdom and any Member State, since the end of the implementation period, are to be considered no more as intra-Community transactions, but rather as imports and exports.

Starting from 2021, therefore, the EU Member States began to apply the import regime, as provided for by Directive 2006/112/CE, to purchases from the UK.

The UK, on the other hand, by virtue of its recovered autonomy also in the fiscal field, has put in place from 1st January 2021 a new import VAT regime valid therefore also for goods coming from the European Union.

This new regime, in particular, subdivides and presents different VAT rules depending on whether the value of the consignment of imported goods is above or below a set threshold of £135[113] [114].

In case the value of the consignment is below this threshold, a further differentiation is applied depending on whether the recipient of the good is taxable person (B2B) or not (B2C).

Relevantly, before presenting in detail this new regime which as from 1st January 2021 applies in the United Kingdom it is necessary to also introduce the peculiar case of the Northern Ireland.

To avoid this, a case where the UK already implemented the exercise of this legislative sovereignty can be found, as mentioned above, in the TCBTA 2018, Part 3, Section 42.

Indeed, Section 42(1) established that *"Any EU regulation so far as applying in relation to value added tax, and any direct EU legislation so far as relevant to any such regulation, that form part of the law of the United Kingdom as a result of section 3 of the European Union (Withdrawal) Act 2018 cease to have effect"*.

This example, as mentioned, simply represents a case where the UK has implemented its legislative autonomy in the VAT field, but remarkably, the changes over time may then involve, potentially, all other aspects of the domestic VAT regulatory system.

See SACCARDO N., et al., 2021, *Tax implications of Brexit, Bloomsbury Professiona*l, Kindle version, Chapter II, paragraph 2.4.

[113] With specific reference to this threshold, it is important to underline which cost elements contribute to determine the value of the delivery.

To this end, a company making sales of goods to the UK, first of all, has to take into account the selling price of the goods making up the consignment.

Other costs instead, such as transport or insurance cost or any other taxes identified in customs from any relevant document do not add to the value of the delivery.

In other words, such costs do not have to be counted by a company when verifying whether or not the £135 threshold has actually been exceeded.

See ASQUITH R., 2021, UK 2021 VAT on ecommerce B2C imports, *Avalara (online), available at* https://www.avalara.com/vatlive/en/vat-news/uk-post-brexit-vat-on-e-commerce-b2c-imports.html [Accessed 15/01/2022].

[114] Relevantly, the new provisions in force in the UK as from 1st January 2021, in addition to providing for this new threshold of £135, also abolished the Low Value Consignment Relief.

For now, it is sufficient to point out that, by virtue of the Trade and Cooperation Agreement concluded between the UK and the EU, certain sources of EU law continue to apply in Northern Ireland even after the implementation period.
Specifically, the Customs Code of the Union and the EU VAT rules on intra-Community trade of goods[115] continue to have validity in Northern Ireland, which basically means that trade in goods between NI and any other Member State continues to be treated for VAT purposes as an intra-Community transaction regulated by the 2006 VAT Directive, and not as an import or export.
In the light of this, it is clear that the UK import regime described below, with reference to the importation of goods from the European Union, is only applicable when goods are imported into Great Britain, thus excluding Northern Ireland for the reasons indicated above.
The special case of Northern Ireland will be specifically dealt with later in this chapter, in section 2.8.

2.5.1 Imports of goods into Great Britain from the EU with a value not exceeding £ 135 (B2B)

The following provisions, effective in the UK from 1st January 2021, govern the VAT treatment of imports into Great Britain where the consignment of goods does not exceed £135 and where the recipient of the goods is a taxable person.
In this specific case, i.e., where the transaction is characterised by the two elements described above, the procedure of the reverse charge finds application[116].

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[115] It is important to emphasise that the validity in Northern Ireland of the EU VAT provisions relates to goods only and, therefore, the VAT treatment of services in Northern Ireland will be aligned, as from 1st January 2021, with the UK VAT provisions, discussed in section 2.7.
[116] Section 7AA of the Value Added Tax 1994 (VATA 1994), inserted by the Taxation Act 2020 s.11(1)(e), specifically elaborates on the cases and conditions that must be met in order for the reverse charge mechanism to apply to goods imported from abroad into the UK.
To this end, section 7AA(1) provided that *"This section applies where—*
(a) goods are supplied by a person ("A") to another person ("B"),
(b) B is registered under this Act,
(c) the supply involves the goods being imported,
(d) the intrinsic value of the consignment of which the goods are part is not more than £135, and
(e) the consignment of which the goods are part—
(i) does not contain goods of a class or description subject to any duty of excise whether or not those goods are in fact chargeable with that duty, and whether or not that duty has been paid on the goods, and
(ii) is not a consignment in relation to which a postal operator established outside the United Kingdom has an obligation under an agreement with the Commissioners to pay any import VAT that is chargeable on the importation of that consignment into the United Kingdom."
In line with this, therefore, the transaction is subject to reverse charge where the sale of goods is made to a UK taxable person and where the value of the consignment is less than £135. Other conditions are then set out with specific reference to the type of goods involved in the transaction. For example, point (e)(i) states that the goods shipped must not be part of a class subject to any excise duty.

Therefore, if a taxable person in the UK provides the foreign vendor with his own VAT number, then the responsibility for accounting for VAT passes to the acquirer of the goods, i.e., the UK taxable person.
In particular, through the reverse charge mechanism, it is the UK purchaser that applies the UK VAT to the transaction but, importantly, the VAT has to be accounted for both in the VAT debit box and, for the same amount, in the VAT credit box of the VAT return.
In this way, therefore, no VAT is materially paid by taxable persons to the tax authority of the United Kingdom.
As a way of example, consider the case of a French company which sells goods, the value of which does not exceed the £135 threshold, through its ecommerce to a company established in Great Britain after the implementation period.
In such case, for the European supplier the transaction consists of an export which, as seen above, in accordance with the provisions of the Council Directive 2006/112/EC and specifically with Art. 146 (1), constitutes a VAT-exempt transaction.
Furthermore, under the new rules in place in the UK as of 1st January 2021 the European supplier will not be responsible or in charge of paying UK VAT on importation and, therefore, it will not be necessary for the French company to register for VAT in the UK.
As mentioned, in fact, it will be the British taxable person which, in application of the reverse charge mechanism, will proceed with a double entry in his VAT return.
It is important to note at this point that if the recipient of the goods does not provide the foreign seller with a valid VAT number at the time of the purchase, then in this case the transaction is no longer subject to the rules described above, but rather the rules for B2C transactions apply, which will be dealt with in more detail in the next sub-section.

2.5.2 Imports of goods into Great Britain from the EU with a value not exceeding £ 135 (B2C)

The following measures regulate the treatment of imports of goods into Great Britain under the condition that the value of the consignment does not exceed £135 and that the buyer in this transaction is a non-taxable person.
The distance selling regime mentioned in subsection 2.3.2 no longer applies[117].

[117] Specifically, all intra-EU distance sales to a UK non-taxable person were, until 31st December 2020, subject to the distance selling regime provided for in Art. 33 and 34 of the Council Directive 2006/112/EC.
That is, before the end of the transitional period, protection thresholds were in force for each Member State and if these thresholds were not exceeded the supplier was no longer obliged to apply the VAT of the Member State of destination and, therefore, could also avoid VAT identification in such Member State.
This regime, of course, no longer apply from 1st January 2021.
See FREEDMAN J., & LOUTZENHISER G., 2022, Tax policy in the UK post-Brexit, *Oxford Review of Economic Policy*, 38(1), p. 199.

Having specified that, for B2C imports of goods with low value, i.e., below £135, as of 1st January 2021, the point at which VAT is levied is changed from the point of importation to the point of sale, which means, basically, that the EU sellers must show and charge VAT already at the moment when the UK consumer purchases goods on their website.

Thanks to this modification, in particular, it has become possible to streamline customs procedure considerably.

In fact, VAT will not have to be paid at customs and this makes it likely that there will be fewer instances of delay in the arrival of goods to the UK customers due to slow customs clearance procedures.

Having established this, i.e., that VAT is paid at the point of sale, it clearly follows that the foreign seller must necessarily obtain a UK VAT number, as the taxable person making the sale is responsible for declaring and paying the UK VAT, already collected, to the UK tax authorities[118].

If a German business, for example, sells goods with a total value of less than £135 to a UK end consumer, then in this case it will be such European company that will have to charge UK VAT on the sale.

It follows that the taxable person must carry out VAT identification in the UK and account for the VAT due on his VAT return.

Relevantly, up to this point it has been considered the case where the foreign seller makes a direct sale to the consumer established in Great Britain but, however, another scenario needs to be taken into account here, i.e., the case in which the sale to final consumer is facilitated by an Online Market Place[119] which is involved in the sale.

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[118] LYDIATE H., 2021, Brexit Begins, *Art Monthly*, 443, p. 46.

[119] In order to provide a precise definition of an Online Marketplace, HM Revenue & Customs has intervened directly.

In particular, according to HMRC, the term Online Marketplace refers to a business that uses an electronic interface to facilitate the sale of goods to consumers.

An OMP, in order to qualify as such, again according to HMRC, must necessarily meet the following three conditions: it must set out the terms and conditions on how the goods are to be supplied to the customer, it must be involved in authorising or facilitating payment and it must also be involved in the delivery or ordering of the goods.

Furthermore, HMRC then points out that an enterprise that provides only one of the following services, i.e., processing of payments related to the supply of goods, advertising of the goods or redirecting the customer to another electronic interface where the goods are sold, in case there is no further intervention in the supply, is not to be considered an OMP.

See HRMC, *VAT and overseas goods sold to customers in the UK using online marketplaces,* available at https://www.gov.uk/guidance/vat-and-overseas-goods-sold-to-customers-in-the-uk-using-online-marketplaces [Accessed 17/01/2022].

The reason for that, in fact, is that the involvement of an Online Market Place results in changes to the VAT liability of the supplier and this has been expressly stipulated by the UK legislator, as of 1st January 2021, in section 5A[120] of VATA 1994.

Specifically, these new rules provide that where an online marketplace is involved in a sale, and is facilitating it, then such supply is deemed to be made in the UK no longer by the foreign seller, but rather by the online marketplace involved.

As a result of this, the foreign seller will be exempt from VAT registration in the UK as it is the marketplace that, indeed, becomes responsible for declaring VAT in the UK and will therefore have to register for VAT there.

Consider at this point the example given above of a German company selling goods, under £135, to a UK end consumer but, this time, the sale is facilitated by an Online Marketplace.

As mentioned above, the presence of an OMP facilitating the sale implies in this case the transfer of VAT liability from the European supplier precisely to the OMP.

It will be then the latter, which, by virtue of section 5A of the VATA 1994, charges VAT at the point of sale and will therefore have to register for VAT in the UK and declare UK VAT on its VAT return.

2.5.3 Imports of goods into Great Britain from the EU worth more than £135

From 1st January 2021, for imports of goods into Great Britain with a total value of more than £135, the traditional VAT regime for imports also applies to EU suppliers, which basically means that the person importing the goods into Great Britain will be responsible for paying import VAT in the UK.

That said, for EU suppliers the responsibility to pay VAT on importation or not will depend on the Incoterms clause being agreed with the customer, as it is precisely this Incoterms clause that determines which of the two parties, i.e., the seller or the buyer, is to be held responsible for the import of the goods into GB.

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[120] Section 5A of the VATA 1994 is specifically concerned with supplies of goods facilitated by online marketplaces.
Paragraph 5A(1), indeed, states that *"This section applies where—*
(a) a person ("P") makes a taxable supply of goods in the course or furtherance of a business to another person ("R"),
(b) that supply is facilitated by an online marketplace, and
(c) one of the following applies—
(i) the imported consignment condition is met, or
(ii) the supply of goods to R does not involve those goods being imported, but P is established outside the United Kingdom."
In view of the above, therefore, the transactions dealt with in this paragraph, i.e., imports of goods into the UK with a consignment value of less than £135, fall within the scope of section 5A of the VATA 1994, if such transactions, clearly, are facilitated by an online marketplace.

In other words, depending on the agreed clause, the party responsible for importing the goods and paying the import VAT will be different[121].

By way of example, consider two common Incoterms clauses, i.e., the Delivered Duty Paid (DDP) and the Delivered at Place (DAP).

Specifically, if DDP is agreed, then it is the overseas supplier who is deemed to be the Importer of Record and must therefore bear the burden of customs clearance of the goods, pay import VAT and then subsequently charge UK VAT on the onward sale.

If this were the formula chosen, then clearly the supplier would have to open a VAT position in the UK to carry out the transactions and obligations described above.

On the other hand, if DAP is agreed, then it is the UK customer who will handle customs clearance and, therefore, the overseas supplier will not need in this case to proceed with VAT identification in the UK.

Having said that, it is important to mention at this point that the taxable person who, on the basis of the agreed Incoterms, is required to pay VAT on importation is, subject to the conditions set out in the provisions contained in section 24, 25 and 26 of the VATA 1994[122], entitled to recover the import VAT.

In particular, with specific reference to the way in which import VAT will be paid and recovered by a taxable person, as of 1st January 2021 the UK has put in place a new accounting and optional mechanism called Postponed VAT Accounting (PVA).

In practice, through this new system a UK VAT registered business importing goods can simply declare import VAT as input VAT and output VAT in the same VAT return.

As a result, no material payment needs to be made to customs and this inevitably translates into a significant cash flow benefit for importing companies, contrary to what happened in 2020 before the introduction of PVA.

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[121] For more information on the various Incoterms clauses and on the history of Incoterms, see DURDAĞ C., & DELIPINAR G. E., 2021, The past, today and future of incoterms in international delivery: A review on the innovations in logistics. *Journal of Economics Library*, 7(4), 201-207.

[122] Section 24 of VATA 1994, following the amendments made by the Taxation (Cross-border Trade) Act 2018, provides the definition of input tax in relation to taxable persons.

Specifically, Section 24(1) provides that "*Subject to the following provisions of this section, "input tax", in relation to a taxable person, means the following tax, that is to say—*

[..]

(c)VAT paid or payable by him on the importation of any goods

being (in each case) goods or services used or to be used for the purpose of any business carried on or to be carried on by him."

Accordingly, Section 24(1) effectively provides that VAT paid on importation falls within the definition of input tax.

Section 25 and 26 of the VATA 1994 then set out the right of taxable persons to claim a credit for input tax.

In the light of the above, therefore, import VAT constitutes an input tax giving rise to a VAT credit subject to the conditions laid down in sections 25 and 26.

In fact, before the end of the transition period, VAT had to be paid necessarily upfront at customs and could only be recovered later by requesting a C79 document, issued monthly by HMRC, which certified the exact amount of import VAT paid in the preceding month by the UK importer.

It was only through this document that UK businesses could therefore be allowed to recover import VAT on their next VAT return[123].

The negative impact on cash flow resulting from this procedure is evident, as there could be a time lag of up to three months between the time the VAT was paid upon importation and the time when it was recovered.

Conversely, as of 1st January 2021, thanks to the implementation of the Postponed VAT Accounting, this time lag is actually eliminated because, as mentioned, the goods enter in free circulation in the UK without the need for advance payment of VAT to customs.

At this point, to recap what has been stated above, consider by way of example the case of a Germany company exporting goods to Great Britain for a total value exceeding the £135 to both a UK VAT registered company and to a final consumer who buys the goods for private purposes.

If DDP is agreed, then it is the German supplier that imports the goods and will therefore be responsible for clearing the goods through customs and paying the import VAT.

In order to do this, the overseas seller must first register for VAT purposes in the UK, if not already registered, and then decide which procedure will be used to pay and recover the import VAT due.

That is, he can either opt for the Postponed VAT accounting without actually paying the VAT, or he can proceed with the payment of the VAT upfront and then recover it via the C79 form.

As mentioned above, the PVA mechanism provides a significant cash flow benefit and, therefore, it is likely to be the preferred method for importing companies.

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[123] When a business registered for VAT in the UK opts to pay import VAT upfront, it will have to claim a VAT refund in its next VAT return, assuming it has obtained the C79 form attesting the actual payment of VAT on importation.

Specifically, from a practical point of view, in this case the taxable person must enter the amount of VAT paid on importation in box 4 of the VAT return (VAT reclaimed on inputs) in order to reclaim it, and in addition he must also fill in box 7 (Total Value of purchases excluding VAT).

If, on the other hand, the taxable person makes use of the Postponed VAT Accounting mechanism, the VAT return will clearly have to be filled in differently.

In particular, if the PVA is opted for, the taxable person would have to enter the amount of import VAT not materially paid in box 1 of the VAT return (output VAT due on sales) and then enter the same amount in box 4 (VAT reclaimed on inputs) in order to offset the debt shown in box 1.

The obligation to complete also box 7 (Total value of purchases excluding VAT) remains unaffected.

For more information on the functioning of the Postponed VAT accounting see PRINCE A., 2021, Postponed VAT accounting: How it works for businesses importing goods into the UK, *sage (online),* available at https://www.sage.com/en-gb/blog/postponed-vat-accounting/ [Accessed 19/01/2022].

That said, after accounting for VAT on importation the German supplier will then make the subsequent sale to the two customers charging UK VAT.

Conversely, if the terms of delivery are to be arranged through the DAP clause, then the different allocation of obligations and risks would result in the German company not having to proceed with VAT registration in the UK but, simply, the transaction on its side would be considered as a VAT-exempt export under Article 146(1) of the Council Directive 2006/112/EC.

The reason for this is that, under the DAP rules, responsibility for customs clearance of goods and payment of import VAT is transferred, as mentioned above, from the overseas seller to the UK acquirer, who clearly if VAT registered will be able to opt for PVA or upfront payment of VAT.

As a final point, it is also important to specify that for imports of goods into Great Britain, where the value of the consignment exceeds £135, the new provisions on online marketplaces, mentioned in section 2.5.2., do not find application here as these transactions are outside the scope of section 5A of the VATA 1994[124].

2.6 1st January 2021: VAT rules regulating exports from Great Britain to the European Union

From 1st January 2021, the sale of goods by a company established in Great Britain to a Member State of the EU clearly no longer qualifies as an intra-Community supply and, therefore, the distance selling regime, previously introduced in section 2.3.2, ceases to apply when goods are sold to non-taxable persons in the EU.

The same also applies to B2B transactions, which are no longer subject to the rules governing intra-Community acquisitions of goods, described in section 2.3.1.

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[124] Section 5A (1) of the VATA 1994, as amended by the Taxation (Post-Transition Period) Act 2020, sets out which transactions are subject to the new rules in place from 1st January 2021 concerning online marketplaces.
Section 5A(1), in particular, provides that the new provisions apply where the supply is facilitated by an OMP and provided that at least one of the following conditions is satisfied, namely:
"(i)the imported consignment condition is met, or
(ii)the supply of goods to R does not involve those goods being imported, but P is established outside the United Kingdom."
Imports of goods into Great Britain, where the value of the consignment exceeds £135, therefore clearly do not fall within the scope of section 5A, as neither of the above conditions is met.
The first condition, indeed, is infringed because of the value of the consignment, which exceeds £135, while the failure to satisfy the second condition is caused by the fact that the goods being sold are outside the territory of Great Britain at the time of sale and, therefore, must be imported.
As a result, for imports of goods with a total value of more than £135, if an overseas supplier engages an online marketplace for the facilitation of the sale, the responsibility for fulfilling VAT obligations related to the sale will not be transferred to the OMP involved but, instead, will remain with the seller.

Having clarified that, as of 1st January 2021, sales of goods located in Great Britain to any Member State, regardless of whether they are B2B or B2C, become indeed subject to the export UK VAT regime.

In this respect, exports are supplies which are zero-rated in the UK, meaning that the VAT rate to be applied is 0%, and this is expressly stated in the VATA 1994, section 30(6), according to which *"A supply of goods is zero-rated by virtue of this subsection if the Commissioners are satisfied that the person supplying the goods—*

(a)has exported them".

Importantly, however, in order for an export to be zero-rated there are certain conditions that must be carefully considered and complied with by the supplier.

Namely, the exportation of goods must take place within a maximum time limit, which, in most cases, is equal to three months even if there are also exceptions where the maximum time limit for exporting becomes equal to six months[125].

In addition, another condition that must be met concerns the documentation or the evidence that the exporter must obtain and keep in order to prove that the transaction has actually taken place.

If one of these conditions is not met, i.e., if the supplier is unable to demonstrate that the transaction actually took place within the specified time limits, then the export will no longer be subject to zero-rating, but the appropriate UK VAT rate will be applied.

Having established that exports by UK traders are generally zero-rated, provided that the above conditions are met, it is also necessary to mention that the exporter's VAT liabilities may vary considerably depending on the Incoterms clause agreed between the parties, as was also previously demonstrated in section 2.5.3 where the differences between DAP and DDP were analysed.

In particular, consider to this end a sale of goods made by a taxable person established in Great Britain with a final destination in any Member State, and assuming that risks, charges and obligations are allocated between the parties under the DAP clause.

In this case, the risks and liabilities associated with the shipment of the goods are borne by the UK seller until an agreed location, but customs clearance of the goods and payment of import

[125] As a way of example, for the supplies of goods which have been processed or incorporated into the goods exported, an extension of the time limit, up to six months, within which the export must be made is allowed.
Another example in this regard concerns the movement of thoroughbreds from Great Britain to a place outside the UK, or from the Northern Ireland to a place outside the European Union.
In such a case, the time limit for the movement outside the UK is 6 months but can also be further extended to 12 months under certain conditions.
See HMRC, *VAT on goods exported from the UK (VAT Notice 703)*, available at https://www.gov.uk/guidance/vat-on-goods-exported-from-the-uk-notice-703#para112 [Accessed 22/01/2022].

VAT are done by the buyer and, therefore, no obligation arises for the seller to register for VAT purposes in the territory of the Member State where the goods are sent.

On the contrary, as seen, above, the DDP clause implies that the seller, in addition to his responsibilities under the DAP clause, is also in charge of clearing the goods through customs and paying taxes including, of course, import VAT which could result in the UK exporter being required to register for VAT in the Member State of destination.

In line with this, it is therefore essential that a business in Great Britain selling goods to several Member States considers appropriately and separately the VAT jurisdiction in force in each Member State to which its sales are directed, as VAT rules, such as the rules governing the method of payment or recovery of import VAT, can vary significantly from Member State to Member State.

That said, consider by way of example the case where a UK company, after the end of the implementation period, exports goods in Belgium and in the Netherlands under the conditions set out in the DDP clause.

In such a scenario the supplier, i.e., the UK company, may be required to proceed with registration for VAT purposes in both countries but can avoid paying import VAT upfront at customs, as a system of deferral of VAT due on importation is in place for both countries.

As mentioned above, however, VAT legislation may be different from one Member State to another and, in fact, the conditions for benefiting from deferred payment vary from Belgium to the Netherlands.

In particular, the deferment of import VAT into Belgium is authorised if the importer is in possession of the so called "ET14.000 license", which, indeed, enables its holders to declare unpaid VAT on importation in the periodic VAT return submitted to the Belgian Tax Authorities[126].

The requirements that the British importer must meet in order to obtain this authorisation are then rather restricted since it is deemed sufficient to be registered for VAT purposes in Belgium and also to possess documentation proving that the importation into Belgium has actually taken place.

On the other hand, as regards importation into the Netherlands, the business established in Great Britain and importing the goods, in order to benefit from the deferral of import VAT, will have to apply for the so called "Article 23 License".

[126] See WILLEMS R., 2012, Guide to tax rulings in Belgium, *IBFD*, p. 35.

By obtaining such license, importers are entitled to reverse charge the import VAT unpaid in a subsequent VAT return, which is basically the same that occurs in Belgium with the EFT14.000 license.
However, as mentioned above, the VAT rules in place in each Member State may be different and accordingly also the conditions for obtaining a VAT deferral licence may vary from Member State to Member State.
In line with this, indeed, the Dutch authorities have established that the importer in order to be entitled to benefit from the Article 23 license has to set up a bank guarantee from a Dutch bank, which as previously seen is not required under the Belgian VAT jurisdiction.
It is important to emphasize that in the above example only one aspect of differentiation has been presented, namely the conditions required to obtain a VAT deferment license, between the VAT jurisdictions of only two Member States, but importantly it should be pointed out that the complexity of the scenario for UK businesses inevitably increases with the number of Member States to which they export goods.
Indeed, in the most extreme scenario, businesses established in Great Britain could be faced with possibly as many as twenty-seven different VAT jurisdiction and possibly as many VAT registrations in the European Union, which clearly would result in extremely high compliance and administration costs.
In the light of the this, therefore, it is clear that UK businesses, except those established in Northern Ireland, exporting goods to countries in the European Union are faced with a considerable degree of complexity, especially if they also have to act as Importers of Record and are therefore responsible for importing goods into the different Member States where the goods are sold.

2.6.1 Introduction in the EU of the Import One-Stop-Shop: impact on GB businesses

The VAT regime described above regulates the export of goods from Great Britain to the European Union from 1st January 2021 and, as seen, under these rules the situation for British companies is undoubtedly characterised by a high degree of complexity, also in view of the fact that, by virtue of the agreed Incoterms clauses, the companies established outside the Union may be required to proceed with VAT registration in all the Member States in which a sale of goods is made.
Significantly, however, an important change took place in the European Union on 1st July 2021, the date on which the e-commerce VAT package came into force.

On 1st July 2021 indeed Low Value Consignment Relief in the EU is abolished[127], which means that VAT must be paid on all goods imported into the European Union, irrespective of their value.

However, on the same day that such relief is removed, the optional Import One-Stop-Shop scheme (IOSS) is introduced in the EU, to which both taxable persons established within the territory of the Community and taxable persons not established in the EU can register and benefit[128].

Specifically, it is important to emphasize that first of all this scheme applies exclusively to the distance sale of imported goods, defined by EU Council Directive 2017/2455 as *"supplies of goods dispatched or transported by or on behalf of the supplier, […] from a third territory or third country, to a customer in a Member State"*[129], and, in the light of this, supplies of goods dispatched from Great Britain fall therefore within the definition provided above.

In addition, it is essential to emphasise that the IOSS does not apply to all types of goods, but only to consignments of goods not exceeding €150,00 and provided that the goods being imported are not subject to excise duty[130].

Having clarified this, companies established in Great Britain are entitled to use the IOSS and can therefore benefit from considerable simplifications with regard to the payment and declaration of the import VAT on low-value goods, i.e., valued less than €150,00, which are sold in the EU in a B2C transaction.

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[127] The Low Value Consignment Relief is abolished on 1st July 2021 by Article 3, Chapter 8 of Directive 2017/2455/EU, which indeed deleted Title IV of Directive 2009/132/EC.

[128] Eligibility to use the IOSS scheme for both taxable persons established in the EU and taxable persons not established within the Community is expressly provided for in Chapter Six, section 4, Article 369m of the Council Directive 2006/112/EC.

[129] Article 14 (4) of Directive 2006/112/EC, as amended by Directive 2017/2455, defines and specifies which transactions qualify as distance sales of goods imported from third countries or third territories.

To this end, Article 14(4) also states that a transaction, in order to qualify as a distance sale of imported goods, must meet two conditions.

First, the supply of goods must be made to any non-taxable person or to taxable persons and non-taxable legal persons, but, in such cases, only insofar as their intra-Community acquisitions are not subject to the application of VAT pursuant to Art. 3 (1).

Second, the imported goods being transacted must neither be new means of transport nor goods supplied after installation or assembly by or on behalf of the supplier.

[130] As mentioned, the applicability of the IOSS system does not cover all imported goods, but some conditions are expressly required, including the value of such goods, which cannot exceed € 150,00, and also the condition that such goods are not subject to excise duty.

In particular, such requirements are expressly provided for in Article 369l, which has been inserted into the VAT Directive following the amendments made by Directive 2017/2455.

The mentioned Article, in fact, establishes that *"For the purposes of this Section, distance sales of goods imported from third territories or third countries shall only cover goods, except products subject to excise duty, in consignments of an intrinsic value not exceeding EUR 150"*.

For more information on the IOSS scheme, see MERKX M., 2020, New VAT Rules for E-Commerce: The Final Countdown Has Begun, *EC Tax Review*, 29(4), pp. 199-205.

Under this scheme, indeed, the final consumer residing in a Member State, and purchasing goods located in GB, pays the price of the goods already inclusive of VAT at the time of purchase which implies that VAT, in order for double taxation to be avoided, will not have to be paid again to customs at the time of importation and this is expressly stated in Art. 143 (1) of the VAT Directive[131].

Subsequently, the UK taxable person making the sale will transmit the collected VAT, paid by the customer, to the country of destination through a mechanism similar to that provided for in the MOSS scheme mentioned in section 2.3.4.

In fact, by means of a unique tax identification in an EU Member State[132], the taxable person supplying goods from Great Britain to consumers in different Member States can pay its VAT debt[133] in a centralised manner, and it will then be up to the tax authority of the Member State of identification to transmit the VAT collected to the various Member States where this VAT is due.

By way of example, consider the case of an ecommerce company established in Great Britain, and therefore outside the European Union, that sells and transports goods with a total value of less than €150,00 to non-taxable persons established in France and Spain.

These transactions fall within the definition provided by the European legislator of distance sales of imported goods and also comply with the condition set out in Article 369l of the VAT Directive concerning the intrinsic value of the consignments, which does not exceed €150.

[131] Article 143 (1) of the VAT Directive, as amended by Directive 2017/2455, provides that importation of goods which fall under the scope of the IOSS regime shall be exempted, provided that the VAT identification number of the supplier or of the intermediary has been "*provided to the competent customs office in the Member State of importation*".

See VAN DOESUM A., & NELLEN F., 2021, *VAT in a Day,* Maastricht: Fonds Indirect Tax, p. 44.

[132] Article 369l of the VAT Directive, inserted following the amendments of Directive 2017/2455, sets out the various definitions of terms used in Section 4 (Special scheme for distance sales of goods imported from third countries or third territories), in order to provide as precise and clear a legal framework as possible.

To this end, Article 369l defines the meaning to be given to the term "Member State of identification" in Section 4, i.e., the section devoted to the application of the IOSS special scheme.

In particular, when the taxable person is not established in the community, i.e., when he has not established his business in the EU and does not even have a fixed establishment there, the Member State of identification is to be understood as the Member State in which the taxable person has decided to register, meaning that a GB taxable person can therefore choose any Member State as its Member State of identification.

[133] With specific reference to the way in which the taxable person registered with the IOSS scheme can transmit VAT, already paid by the customers, to his Member State of identification, Article 369s of the Council Directive 2006/112/EC states that *"The taxable person making use of this special scheme or his intermediary shall submit by electronic means to the Member State of identification a VAT return for each month, whether or not distance sales of goods imported from third territories or third countries have been carried out".*

Therefore, the VAT return must, in accordance with the above-mentioned article, be submitted electronically to his Member State of identification on a monthly basis.

See also PAPIS-ALMANSA M., 2019, VAT and electronic commerce: the new rules as a means for simplification, combatting fraud and creating a more level playing field?, *Era Forum*, *20(2)*, pp. 213.

In view of the above, the UK company can therefore benefit and dispose of the IOSS scheme as from 1st July 2021 and, in order to do so, will have to proceed with the VAT registration in only one Member State of its choice.
Having said that, as mentioned above, VAT will not have to be paid at customs, but Spanish and French VAT will already be charged and paid by consumers at the time they make the purchase of the goods on the UK seller's website.
Subsequently, the two consignments are imported into the EU and delivered to the two final consumers who made the purchase.
In respect of the VAT collected by the supplier, importantly, there will be no need to register for VAT in Spain and France but in fact, the VAT paid by the Spanish and French consumer will only be declared, through a monthly VAT return, to the tax authority of the Member State of identification.
The tax authority of that Member State will then forward and offset the VAT debt which the UK vendor has accrued to Spain and France.
The benefits and simplifications associated with the use of this new scheme are therefore obvious to GB-based businesses exporting goods to non-taxable persons established in the European Union.
In fact, as seen above, prior to 1st July 2021 a business established outside the EU could be faced with the obligation to register for VAT purposes in all the Member States to which the sales of goods were directed depending on the agreed Incoterms clause whereas, by using the IOSS scheme only one VAT registration in a Member State is required, thus avoiding the obligation to submit different VAT returns in multiple Member States.
In addition, the payment of VAT by consumers at the point-of-sale also simplifies and streamlines the customs clearance procedure as the VAT, already paid, clearly does not have to be paid upon importation.
Having clarified this, it is also important to specify that as part of the reforms introduced by the ecommerce VAT package, it has also been provided that if an Online Marketplace is involved in the facilitation of distance sales of imported goods, then the responsibility and VAT obligations mentioned above shall be transferred to the OMP involved.
This is expressly provided for in Article 14a(1) of the Council Directive 2006/112/EC which states that *"Where a taxable person facilitates, through the use of an electronic interface such as a marketplace, platform, portal or similar means, distance sales of goods imported from third territories or third countries in consignments of an intrinsic value not exceeding EUR 150, that taxable person shall be deemed to have received and supplied those goods himself."*

In the light of the above, if the sale of goods by a company established in Great Britain, with a value of less than €150 and directed to a non-taxable person in the EU, is facilitated by an online marketplace, then the sale will no longer considered to be made by the British supplier but rather by the OMP involved[134].

Consequently, it will be the online marketplace that will have to fulfil the VAT obligations related to this distance sale and, to this end, it will be able as well to benefit from the simplifications granted under the IOSS scheme[135].

Having said that, it is important to underline that the simplifications provided for under the IOSS scheme are, however, limited to B2C imports of goods whose total value does not exceed €150, and, therefore, if the value of the consignment exceeds this threshold then the standard VAT regime for exports of goods and imports, as described and discussed above in section 2.6, continues to apply[136].

2.7 1st January 2021: VAT rules regulating the supply of services between EU-UK

After having analysed the VAT rules governing the sale of goods between Great Britain and the EU Member States, it is at this point necessary to also refer to the rules governing, from the end of the implementation period, the supply of services between the EU and the United Kingdom[137].

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[134] See PAPIS-ALMANSA M., 2019, VAT and electronic commerce: the new rules as a means for simplification, combatting fraud and creating a more level playing field?, *Era Forum*, *20(2)*, pp. 215-216.

[135] Where an online marketplace facilitates the distance sale of imported goods, as mentioned above, it may still decide to opt for the registration under the IOSS scheme, provided that the value of the consignment does not exceed €150 and that goods are not subject to excise duties.

Clearly, in order to benefit from the simplifications provided for by the IOSS, it will also be necessary to determine the Member State of identification of the OMP and this procedure follows the ordinary guidelines set out in Article 369(3) of the Council Directive 2006/112/EC.

That is, if the online marketplace is not established in the EU, then the Member State of identification can be chosen at the discretion of the online marketplace itself.

It should also be noted that if the electronic interface is not established in the EU, then VAT registration in the Member State of identification may only be conducted and pursued through the appointment of an intermediary established in the EU territory.

For more information on the VAT liabilities of online marketplaces as of 1st July 2021, see SCARCELLA L., 2020, E-commerce and effective VAT/GST enforcement: Can online platforms play a valuable role?, *Computer law & security review*, 36, pp. 12-14.

[136] Alternatively, another option available, from 1st July 2021, for businesses established in Great Britain selling goods to the EU is to register with the Union OSS scheme but, in order to be able to register with this scheme, it is necessary for the UK taxable person to have a fixed establishment in the EU or a warehouse in a Member State in which to store their goods.

That said, registration with the EU OSS would in practice allow the UK taxable person to declare and remit on a quarterly basis to the Member State of identification, i.e., the Member State where the warehouse is located, the VAT due on all intra-Community distance sales of goods.

However, as said, this option no longer qualifies as an export for the UK business, as the goods must necessarily be stored in the EU.

[137] As far as services are concerned, UK VAT rules also apply in Northern Ireland.

EU law, indeed, continues to have validity in Northern Ireland only with regard to goods.

Relevantly, the VAT rules governing the supply of services between the various Member States and the UK have not changed significantly, except in relation to some documentation and reporting requirements[138], from 1st January 2021[139].

The general rules concerning the determination of the place of supply of services, established at EU level by the Council Directive 2006/112/EC in Articles 44 and 45, have remained practically unchanged in the UK post-Brexit and therefore continue to apply in the same way as prior to the end of the implementation period.

Such general rules are set out in the UK legal system in VATA 1994, section 7A (2), which specifically establishes that *"A supply of services is to be treated as made—*

(a)in a case in which the person to whom the services are supplied is a relevant business person, in the country in which the recipient belongs, and

(b)otherwise, in the country in which the supplier belongs."

In the light of the above, on 1st January 2021 a B2B supply of services provided by a non-UK supplier to a UK taxable person remains therefore, as a general rule, subject to UK VAT and the accounting procedure of the reverse charge mechanism will again apply, as also occurred in the pre-Brexit era.

It will therefore be the UK customer, who, in application of the reverse charge, will record the same amount of input and output VAT in his VAT return.

In the reverse case, i.e., where a service is supplied by a UK company to a taxable person established outside the UK and so, for instance, in Italy, then such a supply, as of 1st January 2021, remains relevant for VAT purposes in Italy, i.e., the VAT to be applied to the transaction will be Italian VAT and it will be accounted for by the Italian company in its VAT return though the application of the reverse charge mechanism.

With respect to the supply of B2C services, instead, in accordance with section 7A(2), the transaction is deemed to take place, as mentioned, in the country where the supplier is established.

Therefore, services supplied by a UK supplier to a non-taxable person in another country, such as Germany, remain subject, as a general rule, to UK VAT, i.e., the country where the taxable person providing the service is established.

[138] For instance, for the supply of services between the UK and the EU, it will no longer be necessary to submit and fulfil the Intrastat form, which was instead required pre-Brexit.

[139] Relevantly, the EU VAT rules regulating the supply of services does not vary, except in some specific cases, depending on whether the supply of the service takes place at intra-Community level or whether a third country is involved in the transaction, in contrast to the trade of goods, where the VAT treatment varies considerably depending on whether the transactions are intra-Community or not.

As mentioned, pre- and post-Brexit VAT treatment with regard to the supply of generic services between the EU and the UK has basically not changed.
Relevantly, also the special rules, which derogate for specific categories of services from the territoriality principles set out by the general rules, have not undergone major changes on 1st January 2021.
The special rules in the UK legal system, set out in Schedule 4A (*Place of supply of services: special rules*) of the VATA 1994, have in fact, for the major part, remained unchanged.
As a result, specifically, the supply of services by intermediaries, the supply of services connected to immovable property, the supply of transport services, the supply of cultural services, the supply of restaurant and catering services and the hiring of means of transport continue, as from the end of the implementation period, to be subject in the UK to the same special rules that applied in 2020 when the UK was still part of the Union.
That said, there have also been some exceptions, i.e., the rules underlying the supply of certain categories of services between the UK and the EU have been affected following the withdrawal of the United Kingdom.
A particular case, in this sense, is represented by the supply of TBE services by UK businesses to non-taxable persons established in a Member State.
On 1st January 2021, indeed, companies that have established their business in the UK lost the eligibility for continuing to benefit from the Union MOSS, as the United Kingdom lost its status as a Member State after the end of the implementation period.
In the light of this, many of the above-mentioned businesses providing TBE services to non-taxable persons in the EU, in order to continue to benefit from the tax simplifications, have opted to join the non-Union MOSS regime[140].

[140] Specifically, the MOSS, before being amended on 1st July 2021 after the enter into force of the EU ecommerce VAT package, was essentially divided into two schemes, i.e., the Union MOSS and the Non-Union MOSS.
As regards the non-Union scheme, which became the relevant scheme for many UK businesses on 1st January 2021, this was defined by the EU Council Directive 2006/112/EC from Articles 358a to 369.
In particular, Article 359 provided that *"Member States shall permit any taxable person not established within the Community supplying telecommunications, broadcasting or electronic services to a non-taxable person who is established in a Member State or has his permanent address or usually resides in a Member State, to use this special scheme"*.
In line with this, therefore, UK companies not established in the EU could start, as of 1st January 2021, benefiting from the simplifications provided for by the non-Union MOSS scheme, i.e., paying the VAT due in multiple Member States in a centralised manner.
Importantly, however, under the non-Union MOSS scheme the threshold of €10,000 introduced in 2019 ceased to apply, as it was only valid with reference to taxable persons established in one Member State of the EU supplying TBE services to non-taxable persons established in different Member States.
For more information on this point, see LAMENSCH M., 2018, Adoption of the e-commerce VAT package: the road ahead is still a rocky one, *EC Tax Review*, 27(4), p. 189

For this purpose, i.e., to register for the non-Union MOSS, taxable persons previously registered for the Union MOSS in the UK had to choose a new Member State as their Member State of identification[141].

Alternatively, UK-established businesses supplying B2C TBE services in the EU could also, as of 1st January 2021, opt not to register with the non-Union MOSS, but this would require VAT registration in each Member State where such services are supplied[142].

Clearly, from an economic and financial perspective, this second option is very unattractive in the case where a UK business is providing these services in many EU countries, as the VAT registration in multiple Member States clearly entails a considerable burden and bureaucratic complexity for the supplier.

That said, the withdrawal of the United Kingdom has not only affected UK suppliers of TBE services in the EU but, in fact, the B2C supply of such services has also been affected in the opposite direction, i.e., where TBE services are supplied by businesses established in the EU, registered under the Union MOSS, to non-taxable persons in the UK.

From 1st January 2021, indeed, suppliers of TBE services established in the European Union and supplying such services to non-taxable persons in the UK have necessarily to register for VAT there, i.e., in the UK, whereas this could have been avoided, by virtue of the simplifications provided for by the MOSS, until 31st December 2020.

Having said that, the Electronically supplied, Telecommunications and Broadcasting services are not the only category of services for which after the end of the implementation period there has been a modification in the VAT treatment.

To this end, i.e., to assess what are the other services that have undergone a change in the VAT rules following Brexit, it is necessary to take into account Article 59 of the Council Directive 2006/112/EC, according to which the place of supply of professional, advertising, technical, consulting and financial services provided *"to a non-taxable person who is established or has his permanent address or usually resides outside the Community, shall be the place where that person is established, has his permanent address or usually resides"*.

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[141] Article 358a of the VAT Directive stipulated that the Member State of identification of a taxable person not established in the Community had to be chosen voluntarily by the taxable person himself.
In the specific case of UK businesses established outside the EU, the most attractive Member State of identification proved to be Ireland, primarily because of its geographical proximity but, clearly, also for linguistic reasons.
See ARENDS D., NETHERLANDS D. P., & KOLKMAN W., 2020, Brexit through a VAT and customs perspective, *International Tax Review*.

[142] The underlying reason for this is to be found in the provision establishing the place of supply of electronically supplied, telecommunication and broadcasting services.
To this end, Schedule 4A of the VATA 1994, section 15(1) provides that *"A supply to a person who is not a relevant business person of services to which this paragraph applies is to be treated as made in the country in which the recipient belongs"*.
In the light of this, therefore, if as from 1st January 2021 a UK business has decided not to opt for the non-Union MOSS scheme, then a VAT identification in each Member State where TBE services are supplied is required.

Accordingly, where the supply of such services is made to non-taxable persons established outside of the EU, then the principle of taxation in the country of destination applies whereas, if the services are instead supplied within the EU, then taxation remains in the Member State where the supplier is established, pursuant to the general rule set out in Article 44 of the VAT Directive.
In the light of the above, it is clear that the VAT treatment of such services, when supplied between the UK and the EU, has undergone a significant change on 1st January 2021.
Indeed, whereas until 31st December 2020 the supply of such services by a UK-established business to a non-taxable person in any other Member State, or vice versa, was subject to VAT in the country of the supplier, as the supply was still considered to be carried out entirely at intra-Community level, on 1st January 2021 the supply begins to be deemed to be made instead in the country where the consumer is established[143].
As a result, this essentially means that, after the end of the implementation period, a UK taxable person supplying these services to an EU non-taxable person has to proceed with VAT identification in that EU Member State and the same applies in the reverse case, i.e., a business established in the EU has to proceed with VAT registration in the UK when such services are provided there to non-taxable persons.
That said, this change in the place of supply of these services has led to a more disadvantageous scenario especially for UK businesses, in view of the fact that if they supply these specific

[143]As mentioned, the 2006 VAT Directive, as regards the definition of the place of supply, makes a distinction according to whether professional, technical, advertising and similar services are supplied to a non-taxable person established within the Community or not.
The United Kingdom was, until 31st December 2020, still part of the Union and therefore Schedule 4A of the VATA 1994, section 16(1) provided that *"A supply consisting of the provision to a person ("the recipient") who—*
(a)is not a relevant business person, and
(b)belongs in a country which is not a Member State,
of services to which this paragraph applies is to be treated as made in the country in which the recipient belongs".
This rule therefore transposed the provisions of Art. 59 of the EU Council Directive.
On 1st January 2021, however, the United Kingdom effectively becoming a fully-fledge third country necessarily required this rule to be amended, as the wording *"in a country which is not a Member State"* was no longer appropriate as from 1st January 2021.
To this end, the Taxation (Cross-Border Trade) Act 2018, schedule 8, paragraph 89 provided for this lexical amendment, by replacing the words "*which is not a Member State*" with "*other than the United Kingdom or the Isle of Man*".
In the light of this amendment, therefore, the rule laid down in Schedule 4A of the VATA 1994 changes, with effect from 1st January 2021, and becomes *"A supply consisting of the provision to a person ("the recipient") who—*
(a)is not a relevant business person, and
(b)belongs in a country which other than the United Kingdom or the Isle of Man,
of services to which this paragraph applies is to be treated as made in the country in which the recipient belongs".
By virtue of this amendment, supplies of technical, professional, advertising services to non-taxable persons established in the EU become subject to VAT in the country where the consumer is established.

services to, for instance, ten Member States, then VAT registration is required in all these Member States.

Conversely, until the end of the implementation period, the place of supply of professional, advertising, technical, consulting and financial services was identified, by virtue of Art. 59 of the Council Directive 2006/112/EC, in the country where the supplier was established and therefore there was no requirement for UK businesses to proceed with VAT identification in each Member State.

Having said that, it is important to emphasise that this section has presented the VAT rules, related to the supply of services between the EU and the UK, which came into force on 1st January 2021, but relevantly a further important change has entered into force on 1st July 2021. Such new rules introduced on 1st July 2021 will be presented below.

2.7.1 Introduction in the EU of the non-Union OSS: impact on UK businesses

As mentioned in section 2.6.1, on 1st July 2021 the e-commerce VAT package came into force in the European Union which, as seen above, has brought significant VAT simplifications for UK businesses making distance sale of imported goods into the EU.

That said, further simplifications have also been provided for under the ecommerce VAT package with reference to the supply of services made by taxable persons not established within the territory of the Community and from which businesses established in the UK may therefore also benefit.

As of 1st July 2021, in fact, the non-Union MOSS, to which British businesses were able to register as of 1st January 2021 for the supply of TBE services, has been replaced by the non-Union OSS scheme[144], which basically represents an extension of the previous non-Union MOSS.

Under the non-Union OSS, indeed, not only TBE services provided to non-taxable persons in the EU can be reported, but all B2C services whose place of supply is identified in the European Union.

In other words, the possibility for a taxable person not established in the EU to centrally manage, through a unique VAT registration in a Member State, the payment of the VAT due on B2C supplies of services taking place in the EU is extended and includes, in addition to the supply of TBE services, also services such as transport services, land-related services, the

[144] The regulatory provisions referring to the non-Union OSS scheme are contained in Articles 358a to 369 of the Council Directive 2006/112/EC.
The eligibility of taxable persons established outside the Community to use and register for this scheme is provided for in Article 359 of the VAT Directive, according to which *"Member States shall permit any taxable person not established within the Community supplying services to a non-taxable person who is established in a Member State or has his permanent address or usually resides in a Member State, to use this special scheme."*

supply of catering and restaurant services or the admission of cultural, artistic, scientific, entertainment or similar events.

Consider, as a way of example, a business established in the UK which operates a catering business.

First of all, this category of services is subject to special rules as regards the determination of the place of supply, and indeed Schedule 4A of the VATA 1994 provides in paragraph 5 that, irrespective of whether the recipient of the service is a taxable person or not, *"a supply of restaurant or catering services is to be treated as made in the country in which the services are physically carried out"*.

That said, if these services are therefore physically carried out in France and Germany, then by virtue of the rule described above, French VAT and German VAT apply respectively.

Prior to 1st July 2021, these services were not covered by the non-Union MOSS and therefore the UK business had to register for VAT in both Member States in order to proceed with the VAT obligations arising in connection with the supply of these services.

From 1st July 2021, however, the extension of the non-Union MOSS into the non-Union OSS allows, as mentioned, for a significant simplification of VAT obligations also for the B2C supply of this category of services, i.e., catering and restaurant services.

In light of the above, the UK business supplying B2C catering services in France and Germany, thanks to the non-Union OSS scheme in force from 1st July 2021, will indeed be able to pay the French VAT and German VAT due, via a quarterly VAT return[145], only to the tax administration of the Member State of identification, and it will then responsibility of the latter to transfer this VAT to the French and German tax authorities.

In the above case, the supply of B2C catering services has been considered as an example, but relevantly, as mentioned, these simplifications are in fact extended under the non-Union OSS scheme to all the categories of B2C services provided by a taxable person established outside the EU, where the supply takes place in the EU.

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[145] The requirement concerning the periodicity of the VAT return is expressly provided for in Article 364 of the Council Directive 2006/112/EC, which states precisely that *"The taxable person not established within the Community making use of this special scheme shall submit by electronic means to the Member State of identification a VAT return for each calendar quarter, whether or not services covered by this special scheme have been supplied"*.
The same Article then further establishes that *"the VAT return shall be submitted by the end of the month following the end of the tax period covered by the return"*.
As regards the content of the VAT return mentioned above, reference should be made to Article 365 of the EU VAT Directive, according to which *"The VAT return shall show the individual VAT identification number for the application of this special scheme and, for each Member State of consumption in which VAT is due, the total value, exclusive of VAT, of supplies of services covered by this special scheme carried out during the tax period and total amount per rate of the corresponding VAT. The applicable rates of VAT and the total VAT due must also be indicated on the return."*

By virtue of this, the introduction of the non-Union OSS has therefore resulted in economic and compliance benefits especially for suppliers whose services did not fall within the scope of the non-Union MOSS, as the possibility of accounting for the VAT due on services supplied EU-wide through a single VAT return clearly reduces the bureaucratic and administrative complexity that a taxable person would otherwise has to face.

2.8 The case of Northern Ireland: Special Arrangements

Northern Ireland undoubtedly represents in the post-Brexit scenario a special and separate case and in fact a specific protocol called *"Ireland/Northern Ireland Protocol"*, composed of nineteen Articles and seven Annexes, is included in the Withdrawal Agreement in order to deal precisely with the sensitive issue of Northern Ireland[146].

That said, with specific reference to VAT, Article 8 of the Protocol establishes that *"The provisions of Union law listed in Annex 3*[147] *to this Protocol concerning goods shall apply to and in the United Kingdom in respect of Northern Ireland"*[148].

In the light of this, the provisions of EU VAT law relating to goods continue to apply as from 1st January 2021 to transactions between Northern Ireland and any other Member State, which basically means that trade of goods between Northern Ireland and the rest of the EU countries

[146] See PHINNEMORE D., 2020, 'Northern Ireland: A 'Place Between' in UK–EU Relations?', *European Foreign Affairs Review,* 25(4), pp. 631-650.

[147] Annex 3 of the Protocol on Ireland/Northern Ireland contains the provisions of EU VAT law that continue to find application in Northern Ireland even after the end of the implementation period.

Specifically, Annex 3 lists the following provisions:

Council Directive 2006/112/EC of 28 November 2006 on the common system of value added tax; Council Directive 2008/9/EC of 12 February 2008 laying down detailed rules for the refund of value added tax, provided for in Directive 2006/112/EC, to taxable persons not established in the Member State of refund but established in another Member State; Council Regulation (EU) No 904/2010 of 7 October 2010 on administrative cooperation and combating fraud in the field of value added tax; Council Directive 2010/24/EU of 16 March 2010 concerning mutual assistance for the recovery of claims relating to taxes, duties and other measures; Thirteenth Council Directive 86/560/EEC of 17 November 1986 on the harmonization of the laws of the Member States relating to turnover taxes - Arrangements for the refund of value added tax to taxable persons not established in Community territory; Council Directive 2007/74/EC of 20 December 2007 on the exemption from value added tax and excise duty of goods imported by persons travelling from third countries, Council Directive 2009/132/EC of 19 October 2009 determining the scope of Article 143(b) and (c) of Directive 2006/112/EC as regards exemption from value added tax on the final importation of certain goods; Council Directive 2006/79/EC of 5 October 2006 on the exemption from taxes of imports of small consignments of goods of a non-commercial character from third countries; Obligations stemming from the Agreement between the European Union and the Kingdom of Norway on administrative cooperation, combating fraud and recovery of claims in the field of value added tax; Obligations stemming from the Cooperation agreement between the European Community and its Member States, of the one part, and the Swiss Confederation, of the other part, to combat fraud and any other illegal activity to the detriment of their financial interests.

[148] Article 8, Protocol on Ireland/Northern Ireland of the Withdrawal Agreement.

continues to be subject to the same EU VAT rules which found application in the UK pre-Brexit[149] [150].

As a result, the imports and exports regime for goods previously analysed in section 2.5 and 2.6 finds application as mentioned only with respect to Great Britain, excluding Northern Ireland[151].

A B2B supply of goods from a Member State to Northern Ireland will therefore still be treated, as of 1st January 2021, as an exempt intra-Community supply in the Member State of departure of the goods and as an intra-Community acquisition in Northern Ireland, the latter being subject to NI acquisition VAT.

That said, at regulatory level, the introduction into UK law of such Northern Irish acquisition VAT is provided for in schedule 9ZA[152] of the VATA 1994, which, indeed, in section 1(3) establishes that *"VAT charged on the acquisition of goods in Northern Ireland from a member State in accordance with this Schedule is referred to [...] as "NI acquisition VAT""*.

As mentioned, such VAT is to be applied when the transaction is carried out on a B2B basis, i.e., in cases where the person making the taxable acquisitions in NI is a taxable person, and this is expressly mentioned in section 2(1) of schedule 9ZA which deals with defining the scope of NI acquisition VAT[153].

As regards the payment of NI acquisition VAT, instead, section 14 of schedule 9ZA establishes that, in application of the reverse charge mechanism provided for at EU level, NI acquisition VAT is to be considered and treated by taxable persons acquiring the goods both as input tax, *"if the goods are used or are to be used for the purpose of [his] business"*[154], and as output tax.

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[149] SWINBANK A., 2021, Some lessons that might be learnt from Brexit Britain's trade negotiations with the European Union. *Journal of World Trade*, 55(4), p. 528.

[150] In light of this, also EU documentary and reporting obligations, such as Intrastat, continue to apply in trade of goods between the EU and Northern Ireland.

[151] Importantly, a company established in the EU will, from 1st January 2021, have therefore to pay attention to the exact place of establishment of a UK company, because, as mentioned, the VAT rules change depending on whether the goods are sold to a company established in Great Britain or Northern Ireland.

To this end, a company established in Northern Ireland that carries out transactions with the EU will have to distinguish itself from a company established in Great Britain by replacing the abbreviation "GB" in the VAT number with the new abbreviation "XI", which distinguishes a VAT number of a company established in Northern Ireland from a VAT number of a company established in Great Britain, which will continue to show the abbreviation "GB" in front of the VAT number.

See SANTACROCE B., 2021, Brexit, spazio al codice "XI" per le cessioni con l'Irlanda del Nord, *Il Sole 24 Ore.*

[152] The inclusion of schedule 9ZA in the VATA 1994 was provided for in the Taxation (Post-Transition Period) Act 2020, Schedule 2, Paragraph 2.

[153] Section 2(1) of schedule 9ZA defines the scope of the NI acquisition VAT, i.e., it contributes to defining the criteria that must be fulfilled in order for an acquisition of goods from a Member State to be eligible for NI acquisition VAT.

Specifically, section 2(1) states that such VAT applies where:

"(a)the acquisition is a taxable acquisition,

(b)it takes place in Northern Ireland,

(c)it is not in pursuance of a taxable supply (see section 4(2)), and

(d)the person who makes it is a taxable person or the goods acquired are subject to a duty of excise or consist in a new means of transport."

[154] Schedule 9ZA, Section 14(1), of VATA 1994.

In addition to B2B transactions, the continuity of the EU VAT provisions applies obviously to B2C distance sales made by a taxable person established in Northern Ireland to a non-taxable person in the EU and vice versa.

In this case, the distance selling scheme previously discussed in section 2.3.2 applies from 1st January 2021.

In light of this, an intra-Community distance sale made by a taxable person established in NI, from 1st January 2021, is subject to VAT at destination if the protection threshold set by the Member State of consumption has been exceeded in the current or the preceding calendar year and, conversely, if the protection threshold has not been exceeded, the transaction will be subject to domestic VAT, i.e., UK VAT.

Importantly, however, it should be noted that this distance selling regime has then undergone major changes as of 1st July 2021, with the entry into force of the ecommerce VAT package.

The protection threshold previously provided for in Article 34 of the Council Directive 2006/112/EC have been indeed replaced on 1st July 2021 by a single protection threshold of €10.000[155], identical in all Member States.

That said, in order to verify whether or not the threshold is exceeded, the taxable person established in Northern Ireland will have to consider together all intra-Community distance sales of goods made in each Member State.

In case the total value of such sales is below, in the current and the preceding calendar year, this threshold of €10.000, then the domestic VAT, i.e., UK VAT, will have to be charged to such transactions, while if the threshold is exceeded then the taxable person will be required to proceed with the registration for VAT purposes in every Member State to which intra-

[155] This new protection threshold of EUR 10,000, valid and identical in all Member States, is introduced in Article 59c of the Council Directive 2006/112/EC.
This new protection threshold applies to and affects taxable persons established in only one Member State who carry out intra-Community distance sales of goods and supply TBE services to non-taxable persons established in Member States other than that in which the supplier is established.
See LAMENSCH M., 2018, Adoption of the e-commerce VAT package: the road ahead is still a rocky one, *EC Tax Review,* 27(4), pp. 190-191.
In order to make the calculation to determine whether or not the threshold is exceeded in the current and in the preceding calendar year, the EU taxable person, therefore, must take into account the value of both intra-Community distance sales and the value of B2C supplies of TBE services provided at the EU level.
If the threshold is exceeded, then both TBE services and intra-Community distance sales are taxed in the country of consumption, whereas if the threshold is not exceeded, domestic VAT continues to apply.
As mentioned, however, it is important to note that the EU VAT provisions, including therefore also Article 59c mentioned above, continue to apply in Northern Ireland only with regard to goods, as services are not mentioned in the Northern Ireland Protocol.
In light of this, a taxable person established only in Northern Ireland, in order to determine whether the €10,000 threshold is exceeded in the current or previous calendar year, will only have to take into account the value, exclusive of VAT, of intra-Community distance sales, and therefore not of the services supplied.

Community distance sales are directed or, alternatively, he may opt to register under the Union One-Stop-Shop[156].

Registration to this scheme, indeed, allows to manage the VAT debt in a centralised manner, avoiding the burden of having to open a VAT position in each EU country of destination when the €10,000 threshold is exceeded.

In practical terms, for businesses established in Northern Ireland opting to benefit from the union-OSS scheme[157], the VAT due on distance sales of goods made within the Community has to be declared and paid quarterly[158] only to the UK tax administration, and the latter will then be responsible for transmitting the VAT that the supplier should have paid in the various Member States.

Having clarified that trade in goods between Northern Ireland and other Member States continues after the implementation period to be governed by the EU VAT provisions, it is at

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[156] The Union OSS, introduced in the EU on 1 July 2021, is an optional scheme that essentially simplifies the VAT obligations of a taxable person, established in the EU, supplying B2C services taking place in the EU and intra-Community distance sales of goods.
This is set out in Article 369b of the VAT Directive.
In light of the above, therefore, it is provided in the VAT Directive that this scheme extends to both services and goods but, as mentioned above, the scope of the OSS scheme for businesses established in Northern Ireland must necessarily be reduced and limited to goods only, by virtue of the fact that services have not been included in the Northern Ireland Protocol and therefore the VAT treatment of services supplied from Northern Ireland to the EU is not governed, as of 1st January 2021, by the EU provisions and directives.
To this end, Schedule 9ZD (Distance selling of goods from Northern Ireland: Special Accounting Scheme) of VATA 1994, Part 1, states that for persons registered with the OSS in Northern Ireland, only and exclusively the intra-Community distance sales of goods fall within the scope of the OSS, whereas, as previously mentioned, there is no reference to the supply of services.
For more information on the functioning of the Union OSS in Northern Ireland, See HMRC, *EU VAT e-commerce package,* available at https://www.gov.uk/government/publications/eu-e-commerce-package/eu-vat-e-commerce-package [Accessed 15/02/2022].

[157] Paragraph 4 of Schedule 9ZD sets out the conditions that a taxable person must meet in order to register under the OSS scheme in the UK.
Specifically, paragraph 4(1) provides that a business established in Northern Ireland is entitled to register for the OSS scheme, or, alternatively, registration is also granted where the taxable person is not established in Northern Ireland or in a Member State, but has a fixed establishment in Northern Ireland.
It is also provided in paragraph 4(1) that a taxable person who does not comply with any of the above conditions, i.e., is not established and does not have a fixed establishment in Northern Ireland or in a Member State, is also eligible for registration with the OSS provided that the goods sold by such taxable person are dispatched from Northern Ireland.
In view of this, a taxable person who is not established and does not have a fixed establishment in Northern Ireland can therefore still register with the OSS in the UK if he has, for example, a warehouse in Northern Ireland from which the intra-Community distance sales of goods are made.
That said, if one of the three conditions set out above is met, then the taxable person may proceed with the application to the Commissioners for registration with the OSS, and this is set out in paragraph 5(1) of Schedule 9ZD.
The contents and necessary information to be included in the registration request are indicated and listed in paragraph 5(2) and 5(3).

[158] The periodicity for submitting the VAT return for transactions covered by the Union OSS scheme is laid down in Article 369f of the Council Directive 2006/112/EC, according to which *"The taxable person making use of this special scheme shall submit by electronic means to the Member State of identification a VAT return for each calendar quarter".*
The above is also stated in paragraph 11(2) of the schedule 9ZD, which establishes that *"Each quarter for the whole or part of which P is registered under the OSS scheme is a "reporting period" for P".*

this point appropriate to also specify the VAT rules in place on 1st January 2021 which govern the movement and sale of goods between Great Britain and Northern Ireland.

Firstly, in this respect, HMRC has ruled that VAT will continue to be charged on sales of goods between Great Britain and Northern Ireland in the same way as before the end of the implementation period[159].

Accordingly, with the exception of certain specific cases[160], the seller selling goods from Northern Ireland to a customer in Great Britain, or vice versa, will continue to charge VAT as normal, and therefore VAT on sale will be declared as output VAT on the UK VAT return.

The purchaser receiving the goods, if he is a taxable person registered for VAT, will then be able, subject to the normal VAT recovery rules, to recover the VAT charged on the invoice.

That said, HMRC has also laid down guidelines with regard to the VAT treatment to be applied in the event that a taxable person moves own goods between Northern Ireland and Great Britain and, importantly, in this case the VAT rules change depending on whether the movement is from Northern Ireland to Great Britain or in the opposite direction.

Indeed, if a VAT registered business moves its goods from Northern Ireland to Great Britain, then the taxable person will not be required to charge VAT on that movement[161] but, on the other hand, if the movement of own goods takes place in the opposite direction, i.e., from Great Britain to Northern Ireland, then VAT will have to be charged on this movement and then recovered in the UK VAT return, under the normal VAT recovery rules[162].

In addition to the above, the HMRC also provided guidance in relation to the specific case where a taxable person, established in Great Britain and registered for VAT, first moves goods to Northern Ireland and then sells them in the European Union.

In respect of the above transaction, HMRC has ruled that the two movements of goods must be considered separately and, therefore, must be treated separately for VAT purposes[163].

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[159] See HMRC, *Accounting for VAT on goods moving between Great Britain and Northern Ireland from 1 January 2021*, available at https://www.gov.uk/government/publications/accounting-for-vat-on-goods-moving-between-great-britain-and-northern-ireland-from-1-january-2021/accounting-for-vat-on-goods-moving-between-great-britain-and-northern-ireland-from-1-january-2021 [Accessed 17/02/2022].

[160] For instance, an exception is given in the case where the goods are subject in the UK to domestic reverse charge.

[161] Importantly, according to paragraph 6(1) of schedule 9ZB of VATA 1994, the VAT relief on the movement of goods from NI to GB applies only if goods are classified as qualifying Northern Ireland goods.
For more information on this point and on the definition of qualifying Northern Ireland goods, see STENNETT A., REGAN E., & DELLOW PERRY E., 2021, Internal Market Act 2020 and the Protocol on Ireland/Northern Ireland, p. 15

[162] See HMRC, *Accounting for VAT on goods moving between Great Britain and Northern Ireland from 1 January 2021*, available at https://www.gov.uk/government/publications/accounting-for-vat-on-goods-moving-between-great-britain-and-northern-ireland-from-1-january-2021/accounting-for-vat-on-goods-moving-between-great-britain-and-northern-ireland-from-1-january-2021 [Accessed 18/02/2022].

[163] Saccardo N. et al., 2021, *Tax implications of Brexit, Bloomsbury Professiona*l, Kindle version, Chapter II, paragraph 2.20

The first transaction concerns the movement of own goods from Great Britain to Northern Ireland which, as mentioned above, involves the application of VAT which, subject to the normal VAT recovery rules, can be recovered by the taxable person in the UK VAT return.
The second movement, i.e., from Northern Ireland to the Member State, is to be treated as an intra-Community sale of goods and is therefore subject to the normal VAT rules laid down in the Council Directive 2006/112/EC[164].
That said, having analysed and delved into the VAT provisions governing the sale of goods between Northern Ireland and the EU first, and between Northern Ireland and Great Britain subsequently, it is at this point appropriate to also introduce the importation regime in force in Northern Ireland from 1st January 2021, applicable for the imports of goods from outside the United Kingdom and the European Union.
Relevantly, the import VAT rules in Northern Ireland are essentially aligned with the import VAT regime in force in Great Britain on 1st January 2021, already analysed in section 2.5.
That is, for B2C imports of goods into NI from outside the EU and the UK, where the consignment of goods is less than £135, the responsibility for paying and declaring import VAT lies with the foreign seller or online marketplace facilitating the said sale.
The OMP, where it facilitates the sale, or the overseas supplier will therefore have to proceed with VAT registration in the UK in order to account for the import VAT in the UK VAT return[165].
If, instead, the Northern Irish recipient is a taxable person, i.e., the transaction takes place on a B2B level, the responsibility for VAT obligations will pass to such taxable person acquiring the goods, and the import VAT will then be accounted for as input tax and output tax on the same UK VAT return, in application of the postponed VAT accounting which is mandatory in this case.
Where the value of the consignment exceeds the £135 threshold, the standard import VAT regime applies, i.e., whoever imports the goods into Northern Ireland, by virtue of the agreed Incoterms clause, will be liable to pay import VAT.

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[164] See HMRC, *Accounting for VAT on goods moving between Great Britain and Northern Ireland from 1 January 2021*, available at https://www.gov.uk/government/publications/accounting-for-vat-on-goods-moving-between-great-britain-and-northern-ireland-from-1-january-2021/accounting-for-vat-on-goods-moving-between-great-britain-and-northern-ireland-from-1-january-2021 [Accessed 20/02/2022].

[165] Importantly, it has to be noted that for such imports, i.e., imports into Northern Ireland of goods to non-taxable persons and with a value of less than £135, the overseas sellers or the online marketplaces facilitating the sale can also benefit, as from 1st July 2021, from the significant simplifications provided for under the IOSS scheme.
Accordingly, in case the supplier or the OMP has already registered for the IOSS scheme in a Member State of identification, then the VAT due on imports into NI and any other Member State will therefore be accounted for, following the procedure defined in the Council Directive 2006/112/EC, in a single VAT return in the Member State of identification.

Again, if the importer is a taxable person registered for VAT in the UK, the use of the Postponed VAT accounting mechanism is allowed in order to avoid the upfront payment of VAT to customs.

2.8.1 Double channel for VAT refunds claim in Northern Ireland after Brexit

Northern Ireland, as seen, represents a very particular case in the post-Brexit scenario in that the continuity of the EU VAT rules apply at the end of the implementation period with reference to goods only, while services are subject to the UK VAT rules discussed in section 2.7.
That said, this hybrid position of Northern Ireland has also resulted in the VAT refund regulations following a dual path based on whether the VAT paid, and for which a refund is claimed, relates to the purchase of goods or services.
Indeed, by virtue of the continuity of EU law in NI with the sole reference to goods, it follows that only VAT paid on the purchase of goods in Northern Ireland by a taxable person established in a Member State can continue to be subject to the EU provisions after the implementation period and therefore, only in this case, does Directive 2008/9/EC continue to apply.
Clearly, this also covers the reverse case, i.e., a taxable person established in Northern Ireland may continue to make a claim for a refund of VAT paid in the European Union under the provisions of Directive 2008/9/EC if that VAT relates to a transaction of goods[166].
As mentioned above, however, the situation differs if the VAT for which a refund is claimed relates to services or to mixed purchases, i.e., goods and services together[167].
In this case, in fact, EU legislation and Directive 2008/9/EC no longer apply, but rather, a taxable person established in Northern Ireland who requests a refund for VAT paid in the EU on services supplied to him must proceed and make the refund request in accordance with the provisions of the EU Thirteenth Directive, which indeed defines and regulates the procedures for refunding VAT to taxable persons who are not established in the territory of the European Union.
In the light of this, therefore, the taxable person established in Northern Ireland will no longer be able to benefit from the entirely telematic procedure provided for by Directive 2008/9/EC,

[166] See SANTACROCE B., 2021, Brexit e IVA, le nuove regole, *Il Sole 24 ore*.
[167] In order to determine whether the VAT refund follows the EU refund rules or not, it is therefore necessary to refer to the invoice held by the taxable person claiming the VAT refund.
In other words, if in the invoice it is indicated that the transaction relates only to goods, then the Directive 2008/9/EC applies, but this is not the case where in the invoice emerges that the VAT paid refers to the supply of a service or to a mixed purchase of both goods and services.
See CONFALONIERI S., 2021, Brexit: doppio binario per le richieste di rimborso dell'IVA assolta nel 2021, *IPSOA (online), available at*
https://www.ipsoa.it/documents/impresa/contratti-dimpresa/quotidiano/2021/03/23/brexit-doppio-binario-richieste-rimborso-iva-assolta-2021 [Accessed 21/02/2022].

but rather such taxable person will have to apply for a refund directly to the various Member State, taking care to comply with the refund conditions and procedures laid down in each Member State.
Clearly, the simplifications provided for in the Directive 2008/9/EC will neither be available in the reverse direction and indeed taxable person established in the EU, with reference to VAT paid on services in Northern Ireland, will have to apply and make a request directly to HMRC, taking care to comply with the conditions and regulation in force in the UK for the presentation of such a request and for the consequent obtainment of the VAT reimbursement.
To conclude, it is important to underline and recall that for refunds of VAT paid in 2021 in Great Britain by a taxable person established in the European Union, or vice versa, the Directive 2008/9/EC no longer applies, neither with reference to goods nor to services.

2.9 Consequences of Brexit on the appointment of a fiscal representative in the EU

Brexit has had, as has been highlighted so far, important repercussions on the way VAT is applied in transactions between the UK and EU Member States.
As a consequence of this, companies established in the UK are, as of 1st January 2021, subject to a greater complexity which also stems from a concrete possibility of having to register for VAT purposes in more than one Member State, something that could instead be more easily avoided until 31st December 2020 by virtue, for example, of mechanisms provided at EU level such as the distance selling regime for intra-EU distance sales.
On 1st July 2021 however, as seen above, this complexity has been to some extent reduced following the entry into force of various schemes in the EU such as the IOSS from which also businesses based in Great Britain can benefit.
Nonetheless, it should be remembered that the scope of the IOSS is not extremely broad, in that, as mentioned, it only applies and covers the importation of goods of modest value and, therefore, there are still many cases in which a business established in the United Kingdom, and especially in Great Britain, find itself faced with the obligation to register for VAT purposes in more than one Member State.
Having said that, Brexit has led to important and significant changes with regard to the way in which a business established in the UK can carry out these VAT registrations in the European Union.
Having lost its status as a Member State, in fact, UK companies may lose the possibility of registering for VAT purposes in the various Member States directly, which means that, as from

1st January 2021, a UK taxable person may be obliged to appoint a fiscal representative in each Member State where registration for VAT is required[168].

Importantly, the imposition of such an obligation may vary from Member State to Member State due to the fact that each Member State has discretion in this field, i.e., each national legislation may stipulate whether the taxable person established outside the EU must proceed with the appointment of a tax representative or whether the possibility of proceeding with VAT registration directly is still recognised.

As a result, 19 of the 27 Member States initially, i.e., on 1st January 2021, required UK taxable persons to appoint a tax representative, but this number has since been reduced.

The reason for this is to be found in the provisions of the Trade and Cooperation Agreement and specifically in a Protocol contained in it, namely the "*Protocol On Administrative Cooperation And Combating Fraud In The Field Of Value Added Tax And On Mutual Assistance For The Recovery Of Claims Relating To Taxes And Duties*".

Indeed, on the basis of the provisions of this protocol, which establishes and guarantees mutual assistance between the UK and the EU also in the field of VAT[169], many Member States have rescinded what was previously established, effectively removing the initial requirement on UK companies to carry out VAT compliance in their country exclusively through a fiscal representative.

An example in this respect is given by Italy, i.e., on 31st December 2020 the Italian Revenue Agency expressed a favourable opinion on the need for British companies to close their current Italian VAT number and proceed to apply for a new VAT number operating through an Italian fiscal representative, but the tax authorities subsequently changed their position on this matter. In the resolution n.7 of 1st February 2021, indeed, the Italian Revenue Agency expressly provided that, by virtue of the aforementioned protocol contained in the TCA, taxable persons

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[168] It is important to note that businesses established in Northern Ireland, being able to take advantage of the Union OSS, do not have to deal with multiple VAT registrations in the EU for the sale of goods.
Similarly, for services, businesses established in NI can make use of the non-Union OSS and therefore only have to deal with one VAT registration in the EU for all B2C services supplied in the Community.
In light of this, the problem of the tax representative certainly affects more companies established in Great Britain.

[169] The VAT Directive, with regard to the imposition of the obligation to appoint a fiscal representative, stipulates that Member States may not impose this obligation on companies established in a non-EU country in cases where a mutual assistance agreement in the VAT field exists between the EU and that non-EU country.
An example of this is Norway, which has concluded a cooperative administration agreement with the EU in the VAT field and, by virtue of this, companies established in Norway can avoid registering for VAT purposes in the EU through a fiscal representative.
For more information on this Agreement concluded between Norway and the EU, see VANDENBERGHE L., & WALLER, S., 2018, Administrative cooperation between the European Union and Norway in the field of VAT, *EU and International Tax Collection News*, 5(2), pp. 101-102.
Having said this, by virtue of the protocol on mutual assistance in the VAT area contained in the Trade and Cooperation Agreement, many Member States, considering this protocol to be on a par with the one concluded with Norway, have therefore decided to remove the obligation to appoint a fiscal representative for companies based in the UK.

established in the United Kingdom may continue to register directly for VAT purposes in Italy, thus effectively revoking the obligation to appoint a fiscal representative which was initially provided for[170].
That said, there are still several Member States that to date have maintained the requirement for UK taxable persons to operate and fulfil their VAT obligations exclusively through a fiscal representative, including, as a way of example, Portugal, Romania and Greece[171].
In light of the above considerations, it is therefore clear that UK businesses that are required to register for VAT purposes in one or more Member States will need to assess separately the conditions set out in each VAT jurisdiction since, as mentioned, the appointment of the tax representative for UK businesses is a matter that falls within the discretion of national legislation.
Having said this, it should also be pointed out that the appointment of a fiscal representative, should this be required, represents first of all an operation that is not extremely simple and immediate and, above all, operating through a fiscal representative represents a more costly alternative to direct VAT registration.
The reason for this lies in the fact that the fiscal representative will generally be jointly and severally liable with the taxable person represented with regard to the payment and fulfilment of VAT obligations while, in direct identification, this obviously does not occur as the only debtor remains the taxable person.
Furthermore, in the case of fiscal representation, in many Member States the provision of a bank guarantee in favour of the representative is also required in order to mitigate the risks associated with non-payment by the non-resident taxable person, and this adds further complexity to this registration procedure compared to the direct registration.
To conclude, having presented until this point the changes in VAT registration procedures for UK companies in the EU after the implementation period, it is deemed important to specify that, from 1st January 2021, companies established in the EU will be able to continue to register for VAT purposes in the UK without being required to appoint a fiscal representative and, therefore, there is in this case no difference between the pre-Brexit and post-Brexit scenarios for EU-based companies having to register for VAT in the UK.

[170] See GIULIANI G., 2021, Brexit, per gli operatori UK ritorno all'identificativo Iva, *Il Sole 24 Ore*.
[171] For the list, updated to September 2021, of EU Member States that require the appointment of a fiscal representative to businesses established in the UK, see DE LEPELEIRE C., & VAN REET L., 2021, Brexit – Trade and Cooperation Agreement: The Proof of the Pudding in in the Eating, *IBFD*, P. 146.

CHAPTER 3

Consequences of Brexit in customs matters between the UK and the EU

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3.1 Introduction: leaving the EU Customs Union in favour of a Free Trade Area

Brexit has inevitably affected and influenced trade practices between the UK and the EU and this has been amply demonstrated with reference to VAT.

In the previous chapter, indeed, it has been highlighted the enormous complexity that has arisen for companies, especially those established in Great Britain, in fulfilling their VAT obligations in the various Member States with which they do business.

VAT, however, is not the only source of complexity, as the impact of Brexit also affects all customs obligations that must be met by UK or EU companies from 1st January 2021.

The reason for this is that the withdrawal of the United Kingdom from the EU has also meant the exit from the EU Customs Union and the loss of the many advantages that Member States can instead enjoy in intra-EU trade.

In this regard, to mention the main elements that characterises EC Customs Union, it is necessary to refer to Article 28 TFEU, which provides that *"The Union shall comprise a customs union which shall cover all trade in goods and which shall involve the prohibition between Member States of customs duties on imports and exports and of all charges having equivalent effect, and the adoption of a common customs tariff in their relations with third countries"*.

By virtue of the above, the free movement of goods between Member States is guaranteed and therefore no customs are required for the above-mentioned intra-EU movements.

As said, the EU Customs Union no longer includes the UK and therefore the free movement of goods between the United Kingdom and any other Member State is no longer guaranteed.
However, it is worth noting that in order to limit the potential and enormous disadvantages caused by the UK's abandonment of the customs union, the two parties involved formulated in the Trade and Cooperation Agreement the establishment of a free trade area.
Although, as mentioned above, this new delivery model has in a sense alleviated the risks and burdens that would have been created if no trade agreement such as the TCA had been signed, it is clear that a free trade model is not a profitable and advantageous solution for the parties, especially if a comparison, which will be performed below, is made between the distinctive features of a free trade area with those of a customs union.
First of all, in a free trade area the parties involved in the agreement, in this case the UK and the EU, adopt and apply their own different tariff to imports coming from third countries, meaning that, for instance, the same category of goods from a third country could be subject to a different tariff depending on whether it is imported into the UK or into the territory of the Community.
In other words, a common customs tariff, which is provided for in a customs union and in Art. 56 of the UCC[172], ceases to apply in a free trade area.
That said, the lack of a common customs tariff also creates another problem, presented below, that is typical of free trade areas.
Indeed, suppose that, due to the lack of a common customs tariff, the EU applies a 3% tariff to the import of a certain category of products and, on the contrary, the UK applies a lower tariff of 2% to the same category of products.
By virtue of this discrepancy, it is clear that a problem of tax avoidance may arise as this scenario would attract imports exclusively to the country with a lower tariff in order to subsequently move these goods to the country imposing a higher tariff[173].

[172] At EU level, as mentioned above, a Common Customs Tariff applies to imports of goods into the territory of the Community.
This is expressly provided for and laid down in Article 56 (1) of the Union Customs Code, according to which *"Import and export duty due shall be based on the Common Customs Tariff."*
Specifically, in order to determine the duty rate to be applied, first of all the goods to be imported into the EU are subject to a classification, i.e., the goods are assigned to a specific product category on the basis of those contained in the Combined Nomenclature, i.e., an eight-digit EU code that serves precisely to identify and classify products entering or leaving the EU.
Each code in the Combined Nomenclature is then given a rate of duty to be applied, and so different products classified under different codes are likely to be subject to different rates.
This system, until 31st December 2020, also applied in the UK as the UK was still part of the European Customs Union until that date.
From 1 January 2021, however, the new tariff regime, the UK Global Tariff, came into force in the UK.
For more information on the UK Global Tariff see SACCARDO N. et al., 2021, *Tax implications of Brexit, Bloomsbury Professiona*l, Kindle version, Chapter III, paragraph 3.9.
[173] FABIO M., 2021, *Brexit: Le regole commerciali tra UE e UK*, Milano: Wolters Kluwer Italia. pp. 7-8.

In this way, in the example above, it would in principle be possible to bring the goods into the country with the higher tariff, i.e., the EU, while only paying the UK tariff of 2%.
In order to avoid such circumvention, a free trade area agreement usually establishes and implements rules of origin, which are in fact provided for and listed in Chapter 2 (Rules of Origin) of the Trade and Cooperation Agreement.
In particular, the provision of such rules of origin allows to avoid the problem of tax avoidance previously mentioned, as the exemption from customs duties in the movement of goods between the UK and the EU is allowed only for goods originating in the respective territories, i.e., the UK and the EU, in observation of the rules of origin provided by the Trade and Cooperation Agreement.
Although this seems to provide an extremely convenient and easy-to-apply solution, the costs associated with complying with these rules and the documentary evidence required to prove the origin of the goods have undoubtedly impacted on the various UK businesses trading with the EU[174], or vice versa, but this will be the subject of in-depth analysis later in the chapter.
That said, another essential aspect that emerges in free trade areas, as opposed to customs unions, concerns the role and operation of customs authorities which become essential[175], while as said these were not required for the movement of goods with other Member States when the UK was still part of the EU Customs Union.
In the light of the above, it is therefore clear that the solution chosen by the EU and the UK in the Trade and Cooperation Agreement, i.e., the formation and establishment of a free trade area, presents several complexities especially at the operational level for companies that trade goods between the UK and the EU.
In order to present this new customs scenario in place between the UK and the EU, the new documentary obligations and the new rules of origin will be analysed in detail in the course of this chapter.
Before proceeding with this, however, it is appropriate to follow the chronological order in which these changes have taken place and, therefore, below it will be analysed first the Withdrawal Agreement and its provisions that governed the customs relationship between the UK and the EU until the end of the implementation period.
Subsequently, the new rules that, as of 1st January 2021, have modified customs practices between the two parties to the Trade and Cooperation Agreement will be presented.

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[174] WACHOWIAK J., & ZULEEG F., 2022, Brexit and the Trade and Cooperation Agreement: Implications for Internal and External EU Differentiation, *The International Spectator*, 57(1), pp. 147-148.
[175] FABIO M., 2021, *Brexit: Le regole commerciali tra UE e UK*, Milano: Wolters Kluwer Italia, pp. 7-8.

3.2 UK-EU: customs rules during the implementation period

The implementation period, as reported in Chapter 1, is a period that has been extended until 31st December 2020 and this has been expressly provided for in Article 126 of the Withdrawal Agreement.

Article 127 of the Agreement, on the other hand, established the continuity of European law in the United Kingdom until the end of that period, i.e., until 31st December 2020.

That said, it should be recalled that the Withdrawal Agreement was implemented and transposed into domestic UK law by the combined provisions of the EUWA 2018 and EUWA 2020, mentioned in Chapter 1.

Specifically, the continuity of the application of European law within the UK borders until the end of the implementation period was established by section 1A of the EUWA 2020[176].

By virtue of the above provisions, i.e., of the provisions of Article 127 of the Withdrawal Agreement transposed into national law by section 1A of the EUWA 2020, it is clear that the provisions of EU customs law continued to apply in the UK until 31st December 2020.

In other words, until the end of the implementation period, the UK continued to be part of the EU Customs Union and the most important piece of EU legislation relating to customs matters, i.e., the EU Regulation 952/2013 which laid down the Union Customs Code in 2013, also continued to apply.

According to this, therefore, goods in the territory of the United Kingdom before the end of the implementation period still qualified as "Union Goods", provided that the conditions set out in Article 5 of the Union Customs Code[177] were met.

The goods were thus permitted to continue to circulate freely between the UK and the EU during the transition period and this was also expressly provided for in Article 41(1), Title I of the Withdrawal Agreement, which established that a good lawfully placed on the market in the

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[176] Section 1A (Saving for ECA for implementation period) of the EUWA 2020 states in fact, in subsection 2, that *"The European Communities Act 1972, as it has effect in domestic law or the law of a relevant territory immediately before exit day, continues to have effect in domestic law or the law of the relevant territory on and after exit day [...]"*.

In other words, section 1A of the EUWA has provided for the saving until the end of the implementation period of the ECA 1972, i.e., the Act of the UK Government by which EU law was enacted into domestic law.

This provision, i.e., section 1A, had therefore transposed into UK law the provisions of Article 127 of the Withdrawal Agreement about the continuity of EU law in the UK until the end of the implementation period.

[177] Specifically, Article 5 (23) of the Union Customs Code, laid down in the EU Regulation 952/2013, provides the definition of "Union Goods", establishing that such a term refers to "*goods which fall into any of the following categories:*

(a) goods wholly obtained in the customs territory of the Union and not incorporating goods imported from countries or territories outside the customs territory of the Union;

(b) goods brought into the customs territory of the Union from countries or territories outside that territory and released for free circulation;

(c) goods obtained or produced in the customs territory of the Union, either solely from goods referred to in point (b) or from goods referred to in points (a) and (b);

Union or in the United Kingdom before the end of the implementation period may *"be further made available on the market of the Union or of the United Kingdom and circulate between these two markets until it reaches its end-user"*.

Moreover, paragraph 2 of Article 41 of the Withdrawal Agreement provided for the prohibition to impose quantitative restrictions, or measures having equivalent effect, on the movement of the goods mentioned in paragraph 1[178].

The movement of goods from any Member State to the UK continued therefore to proceed during the transition period free of tariff and non-tariff barriers[179], i.e., no customs duties were applied to these movements which were neither, as stated, burdened nor hindered by the presence of non-tariff barriers of a technical nature which may relate, for example, to packaging standards or labelling.

Importantly, in addition to what has been stated above, the Withdrawal Agreement also refers to several provisions, contained in Part 3, Title 2, which regulate the peculiar cases where goods have departed from the UK to the EU, or vice versa, before the end of the implementation period but arrived or will arrive at their destination after 1st January 2021.

The first provision contained in Title 2 is Article 47, the first paragraph of which essentially states that such movements of goods continue to be governed by the Union Customs Code, i.e., they continue to be considered "Union Goods".

In the light of the above, therefore, EU regulatory provisions may continue to apply even after the end of the implementation period to movements of goods between the UK and the EU, provided however that further conditions, set out in Art. 47 (2), are met.

Article 47(2), indeed, establishes that the provisions of paragraph 1 shall only apply if the person involved in the movement of goods complies with two important obligations when the goods arrive at the respective border between the UK and the EU.

[178] Article 41(2) of the Withdrawal Agreement, in fact, states that "*The requirements set out in Articles 34 and 35 TFEU and the relevant Union law governing the marketing of goods, including the conditions for the marketing of goods, applicable to the goods concerned shall apply in respect of the goods referred to in paragraph 1*".
In Article 41(2) there is a clear reference to Articles 34 and 35 of the TFEU, and, specifically, these two articles of the TFEU state precisely the prohibition to establish and apply quantitative restrictions on the movement of goods between Member States.
In light of Art 41(2) of the Withdrawal Agreement, therefore, Articles 34 and 35 TFEU continued to apply until the end of the implementation period in the UK.

[179] In compliance with Article 28 of the TFEU which guarantees the free movement of goods within the EU Customs Union.

According to Art. 47 (2), it is necessary first of all to prove that the movement actually began before the end of the implementation period and ended thereafter[180], and secondly, the person moving the goods must prove that they have the customs status of Union goods[181].

In other words, in light of the combined provisions of Art. 47 (1) and (2), if the economic operator introducing goods after the end of the implementation period from the United Kingdom into the customs territory of the Union, or vice versa, can prove that they are Union goods and that the transport actually started before 31st December 2020, then such goods must continue to be treated for customs purposes as Union goods, i.e. they can be released for free circulation without the need to pay customs duties[182].

As seen in the previous chapter, VAT on such goods will continue to be regulated by the provisions of the EU Council Directive 2006/112/EC.

Relevantly, up to this point the regulatory provisions governing the movement of goods between the UK and the EU during the implementation period have been dealt with, but it is also appropriate to refer to the provisions of the Withdrawal Agreement governing customs cooperation and access to EU customs databases during the implementation period[183].

With regard to the participation and use of the information contained in these databases by the UK Customs Authority, Article 8 of the Withdrawal Agreement establishes that *"Unless otherwise provided in this Agreement, at the end of the transition period the United Kingdom shall cease to be entitled to access any network, any information system and any database established on the basis of Union law".*

Therefore, during the implementation period, i.e., until 31st December 2020, cooperation between UK and EU customs authorities was not affected and UK access to EU customs databases was guaranteed.

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[180] To this end, Article 47(2) of the Withdrawal Agreement states that *"The proof of the start of the movement shall be provided by means of a transport document relating to the goods."*

[181] Importantly, Article 47(2) of the Withdrawal Agreement, by expressly requiring the trader to be able to prove that the goods moved between the EU and the UK have the status of Union goods, derogates from Article 153(1) of the Union Customs Code, according to which "*All goods in the customs territory of the Union shall be presumed to have the customs status of Union goods, unless it is established that they are not Union goods.*"

As mentioned, Article 47(2) of the Withdrawal Agreement eliminates the presumption of the status of Union goods and this is in fact expressly provided for in the Article itself, stating that *"For the purposes of paragraph 1, the presumption of the customs status of Union goods as referred to in Article 153(1) of Regulation (EU) No 952/2013 shall not apply".*

Having established that this presumption ceased to apply, Art. 47(2) also establishes the ways in which a trader may prove and demonstrate that the goods have the customs status of Union goods.

Specifically, to this end, Art. 47(2) provides that *"The customs status of those goods as Union goods, [...],shall need to be proven for every movement by the person concerned by any of the means referred to in Article 199 of Commission Implementing Regulation (EU) 2015/2447".*

[182] FABIO M., 2021, *Brexit: Le regole commerciali tra UE e UK*, Milano: Wolters Kluwer Italia, p. 29.

[183] Indeed, cooperation between EU customs authorities is an essential feature of the EU Customs Union and, in order to facilitate this cooperation, the various customs authorities are required to access and participate in EU customs databases.

As said, Article 8 sets the deadline for granting UK access to the various EU databases as 31st December 2020.

This date, however, appears to be a time limit that is misaligned with that provided for in Article 47, mentioned above, of the Agreement.

In fact, it should be recalled that by virtue of the provisions of Art. 47, EU customs provisions may continue to apply in UK-EU trade even after the end of the implementation period, provided that the requirements set out in Art. 47(2) are met.

In light of the above, in order to enable the UK customs authority to fulfil its obligations also for such movements of goods, i.e., those goods arriving at their final destination after January 2021, it was therefore deemed to be necessary to include a further provision in the Withdrawal Agreement which, by way of derogation from Article 8, may guarantee the UK continued access to certain EU databases and IT systems even after the end of the implementation period.

Specifically, this is set out in Article 50 of the Withdrawal Agreement, which provides that *"By way of derogation from Article 8, the United Kingdom shall have access, to the extent strictly necessary to comply with its obligations under this Title, to the networks, information systems and databases listed in Annex IV."*[184]

In conclusion, it is therefore relevant to specify that, in the light of the provisions contained in the Withdrawal Agreement mentioned above, no significant problems in customs matters have arisen for economic operators established in the EU and the UK during the implementation period.

In fact, as has been shown, the movement of goods between the UK and the EU has continued until 31st December 2020, and in specific cases and under certain conditions even beyond that date, to be subject to the same legislative framework that applied prior to Brexit, namely the Union Customs Code.

[184] The IT systems contained and listed in Annex IV are numerous and concern both customs information systems, including, for example, the Economic Operators System or the Customs Decisions System, and IT systems used in the VAT field such as, for example, the VIES (VAT Information Exchange System).
As mentioned above, the IT systems in Annex IV are manifold, but, more importantly, each system has a different time limit and a different type of access granted to UK customs authorities.

3.3 1st January 2021: The Withdrawal of Great Britain from the EU Customs Union

During the implementation period, in light of the above, there has been no impact on customs procedures between the UK and the EU due to the continuity of EU customs law until 31st December 2020 in the UK.

As a result, the free movement of goods was still guaranteed and there were no customs and borders checks between the United Kingdom and the European Union[185].

However, at the end of the implementation period, the effective withdrawal of the United Kingdom from the EU Customs Union occurred and, as a result, 1st January 2021 represented the date on which trade between the two parties, i.e., the UK and the EU, has begun to be regulated on the basis of the new delivery model defined by the Trade and Cooperation Agreement, which takes the form of a free trade area with a preferential relationship[186].

As briefly mentioned in the introduction to this chapter, this transition has inevitably led to a significant change in the procedures that until 31st December 2020 governed the exchange of goods between the UK and the EU, thus creating a series of documentary and compliance requirements for economic operators which, in addition to adding considerable complexity to import and export transactions, also translate into a source of costs not to be underestimated for businesses established in the UK selling goods in the EU, or vice versa.

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[185] GORMLEY L. W., 2009, *EU law of free movement of goods and customs union*, OUP Catalogue, p. 651.

[186] As mentioned, 1st January 2021 was the first day from which the UK, and specifically Great Britain, left the EU Customs Union.
See SWINBANK A., 2021, Some lessons that might be learnt from Brexit Britain's trade negotiations with the European Union, *Journal of World Trade*, 55(4), p. 1.
From this date, therefore, the Union Customs Code ceased to apply within the UK.
However, it is important to note that, by virtue of the new category of domestic law "Retained EU law", the Union Customs Code was initially saved in the UK domestic legal system.
The reason for this is that the Union Customs Code was established at European level by Regulation 952/2013 and, therefore, as mentioned in chapter one, the EU Regulations fell specifically within the "EU direct legislation" category of Retained EU law.
In other words, in light of section 3 of the EUWA 2018, subsequently amended by the EUWA 2020, the European Regulations, including Regulation 952/2013, were converted from 1st January 2021 into UK domestic law, with the effect that such pieces of EU law formed part of UK law even after the end of the implementation period.
See HANCOX E., 2021, INTERPRETING THE POST-BREXIT LEGAL FRAMEWORK, *The Cambridge Law Journal*, 80(3), p. 429
Clearly, this "saving" approach could not be maintained and remain unchanged in relation to EU customs law, since as stated above this would have resulted in a saving in the UK legal order of the Union Customs Code.
For this reason, the UK Government necessarily had to proceed and take action to remove the said EU rule from UK law and, in fact, such removal took place in schedule 7 of the Taxation (Cross-Border Trade) Act 2018 (TCBTA 2018).
Specifically, the provision that removed the application of the Union Customs Code in the UK is to be found in Part 1, paragraph 1 of Schedule 7, according to which *"Any direct EU legislation, so far as imposing or otherwise applying in relation to any EU customs duty, that forms part of the law of the United Kingdom as a result of section 3 of the European Union (Withdrawal) Act 2018 (incorporation of direct EU legislation) ceases to have effect."*
For more information on this point, see SACCARDO N. et al., 2021, *Tax implications of Brexit, Bloomsbury Professiona*l, Kindle version, Chapter III, paragraph 3.7.

That said, the changes that have affected the procedures for importing into the UK from the EU, or for exporting from the UK to the EU, will be presented in detail below.
In order to proceed with this analysis, reference will be made to the Border Operating Model (BOM)[187], which is the subject of a 159-page document published by the Border and Protocol Delivery Group[188] that specifically provides guidance on the operation and functioning of UK Customs in relation to the EU.
Importantly, before analysing the changes occurred as of 1st January 2021, it is also appropriate to mention the special case of Northern Ireland.
Indeed, Northern Ireland not only remains subject, as mentioned in the previous chapter, to the EU VAT legislation but also the Union Customs Code continues to apply after the implementation period[189].
In other words, Northern Ireland's shipments to and from the 27 EU Member States continue to be subject to the provisions of the Union Customs Code also after 1st January 2021 and, therefore, the principle of free movement of goods set out in Article 28 TFEU continues to apply to these movements of goods[190].
The case of Northern Ireland will be precisely dealt with later in the chapter.

3.3.1 The Border Operating Model: imports of goods into Great Britain from the EU

1st January 2021 was the date on which the UK left the EU Customs Union and, as mentioned, this inevitably led to the emergence of greater complexity for economic operators moving goods from the EU to GB.

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[187] See Border And Protocol Delivery Group, 2021, *The Border With The European Union*, available at https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/1041528/2021_December_BordersOPModel.pdf [Accessed 14/03/2022].
[188] The Border and Protocol Delivery Group was set up in the UK in 2017, precisely to deal with the task of outlining and defining the technical and organisational aspects of the new border with the EU.
As mentioned, this work resulted in the publication of the Border Operating Model (BOM) in July 2020.
See SACCARDO N. et al., 2021, *Tax implications of Brexit, Bloomsbury Professiona*l, Kindle version, Chapter III, paragraph 3.20.
It should also be noted that the initial BOM has then undergone further revisions and amendments, resulting in a final update in December 2021.
[189] This is expressly provided for in Article 5(4) of the Ireland/Northern Ireland Protocol, which states that "*The provisions of Union law listed in Annex 2 to this Protocol shall also apply, under the conditions set out in that Annex, to and in the United Kingdom in respect of Northern Ireland."*
In other words, Article 5(4) refers to Annex 2 to determine which Union provisions continue to apply in Northern Ireland after the end of the implementation period.
That said, also EU Regulation 952/2013, which established the European Union Customs Code, is mentioned in Annex 2.
See BARNARD C., 2022, Protection of the UK Internal Market: Article 6 of the Ireland/Northern Ireland Protocol, *Brexit Institute*, p. 11.
[190] MURPHY M. C., 2021, Northern Ireland and Brexit: where sovereignty and stability collide?, *Journal of Contemporary European Studies*, 29(3), p. 413.

From the end of the implementation period, in fact, the introduction of an external border has effectively put an end to the free movement of goods between the Great Britain and the European Union, and controls on any movement of goods between the two parties signatory of the Trade and Cooperation Agreement has also become necessary.
However, it is appropriate to specify that, in order to facilitate this transition and to simplify these new obligations and customs formalities, the Government of the United Kingdom has decided to implement and introduce customs controls on products moved from the EU into Great Britain in three stages, which are expressly indicated in detail in the Border Operating Model published by the Border and Protocol Delivery Group on 13th July 2021[191].
In other words, by virtue of what has been decided and in line with what is reported in the Border Operating Model, the procedures for importing goods coming from the EU into Great Britain have not found immediate and full application already on 1st January 2021, but have been instead deferred and introduced gradually in three different time stages, namely 1st January 2021, 1st January 2022 and 1st July 2022.
Having established this, these new customs procedures will be presented below, following of course the chronological order, i.e., the three-staged approach, established in the BOM.
Starting with the requirements introduced in the first stage, economic operators importing goods into GB from the EU are required first of all, from 1st January 2021, to obtain a GB EORI number, which was instead not necessary until 31st December 2020 for British companies carrying out transactions exclusively within the EU basin, that is, in other words, intra-Community transactions[192].

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[191] SACCARDO N. et al., 2021, *Tax implications of Brexit, Bloomsbury Professiona*l, Kindle version, Chapter III, paragraph 3.20.
[192] As far as the EORI number is concerned, this is an identification code introduced in the EU for the first time in 2009 by Commission Regulation (EC) No 312/2009, and defined in Article 1(18) of the Commission Delegated Regulation 2015/2446 supplementing EU Regulation 952/2013.
Article 1(18), in fact, states that *"Economic Operators Registration and Identification number' (EORI number) means an identification number, unique in the customs territory of the Union, assigned by a customs authority to an economic operator or to another person in order to register him for customs purposes"*.
That said, in the EU, the obtaining of an EORI number is mandatory for all economic operators carrying out transactions relevant for customs purposes in the EU, which obviously includes import and export transactions in the territory of the Community.
For more information on EU EORI number, see GAYK A., NAUJOKE E., & KORMYCH B, 2021, Harmonization of procedures is still work in progress, *WCO News*, 94, pp. 59-60.
In the light of the above, it is clear that until 31st December 2020 economic operators established in the UK who only bought goods from or sold goods to any Member State did not necessarily have to apply for an EORI number, since, as mentioned, such transactions were still intra-Community.
The same was true in the reverse case, i.e., even for a taxable person established in any other Member State, until 31st December 2020, there was no requirement to obtain an EORI number for goods traded with the UK.
As of 1st January 2021, however, GB-based companies need to request a GB EORI number for carrying out import from and export to the EU, as these transactions no more qualify as intra-Community.
The same applies clearly also in the opposite direction, i.e., as of 1st January 2021 EU-established businesses must obtain an EU EORI number, issued by the Member State in which they are established, for importing goods from Great Britain or exporting to Great Britain.

In order to obtain this number, which is functional for customs identification in the UK, companies carrying out imports of goods from the EU must take action and apply to HMRC[193]. In addition to this first requirement, there are of course further documentary and declarative obligations that have arisen as of 1st January 2021 in order to complete the import procedure into GB.

In this respect, for example, after 31st December 2020 it has become mandatory to accompany the products entering Great Britain with the presentation of a customs import declaration[194], in which precise information on goods must necessarily be indicated, including, for example, their origin, classification and value[195] in order to calculate any duties due.

To this end, it should be recalled that the Trade and Cooperation Agreement expressly provides for the possibility of benefiting from an exemption from customs duties if the goods imported into Great Britain originate in the EU, or vice versa[196].

These rules of origin will be analysed in detail separately in section 3.4.

That said, having established that the obligation to present a customs declaration for the import into Great Britain has emerged as from 1st January 2021, it is also appropriate to specify that the Border Operating Model has provided a strong simplification, in place until the end of the

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It is also worth mentioning that if a company established in Great Britain carries out a customs-relevant transaction in the EU after 1st January 2021, then the British company, which already needs to hold a GB EORI code, will be required to also obtain an EU EORI code.
In this case, such EORI number must be obtained from the competent customs authority of the Member State in which the first customs-relevant transaction is carried out by the GB-based company.
This is set out in Article 9(2) of the Union Customs Code, which states that *"economic operators which are not established in the customs territory of the Union shall register with the customs authorities responsible for the place where they first lodge a declaration or apply for a decision"*.

[193] For more information see HMRC, *Get an EORI number*, available at https://www.gov.uk/eori [Accessed 17/03/2022].

[194] The UK legislation on customs declarations, their presentation and other essential features is contained in Schedule 1 (Customs Declarations) of the Taxation (Cross-Border Trade) Act 2018.
Specifically, the compilation of customs declarations is a complicated task, which can be carried out directly by the economic operator or also, due to the inherent complexity involved in the compilation of a declaration, by a customs intermediary.
In the event that the company decides not to appoint a British intermediary, then it is the company itself that must, as mentioned above, proceed directly with the compilation and sending of the import declaration, and, to this end, it must be registered in the Customs Handling of Import and Export Freight (CHIEF) system.
Importantly, it is also worth mentioning that this IT system available in the UK for the completion of customs declarations, i.e., the CHIEF system, will be replaced in 2023 by the system called Customs Declaration Service (CDS).
For more information on this point, see ANDREWS C., 2018, Electronic borders in Europe, *Engineering & Technology*, 13(2), p. 23.
As mentioned before, the completion and submission of an import declaration is clearly not an easy and intuitive task and therefore in most cases this is done by an intermediary.
In this case, registration in the CHIEF system would not be necessary for the trader, as is it the intermediary that will need to be registered.

[195] See Schedule 1 (Customs Declarations), paragraph 7(1) of the Taxation (Cross-Border Trade) Act 2018.

[196] It is important to mention that on consignments entering GB and with a value of less than £135, customs duties are not due.

first stage, with reference to the presentation of the aforementioned import customs declarations.

From 1st January 2021 to 1st January 2022, in fact, the British Government has established that traders importing goods could, if certain requirements were met, opt to use and benefit from delayed declarations which replaced a full customs declaration to be submitted and completed when the goods were presented to UK customs.

As mentioned above, it should first of all be pointed out that this simplification was granted provided that certain conditions were met, i.e., the possibility of opting for a customs simplified procedure was not granted to all traders.

In fact, eligibility for delayed declarations was granted exclusively to businesses established in the UK and for the importation of non-controlled goods, i.e., all those goods which are not listed in Annex 3 of the Border Operating Model[197].

In addition, customs declarations could not be delayed if goods entering Great Britain did not have Union status or were not released for free circulation in the EU before entering Great Britain[198].

Having clarified these important conditions, it is now appropriate to define the essential and operational features of the procedure that allowed, until 1st January 2022, a GB-based importer to benefit from a deferred customs declaration.

Specifically, the postponement of customs declarations could take place through a procedure called "Entry in the declarant's records" (EIDR)[199], which allowed the traders to replace the full customs declaration with the annotation in their commercial records of some information concerning the movement of goods into GB, including, for example, the quantity of goods, their value and the date of importation.

Importantly, the use of the EIDR procedure did not completely cancel the obligation to complete a customs declaration, but simply deferred that obligation.

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[197] Annex 3 of the "Border Operating Model", as mentioned, contains a list of goods defined as "controlled goods", for which the delayed declarations did not apply.

These goods include, for example, excisable goods, toxic chemicals, endangered species, military goods or nuclear material.

As regards the requirements and customs formalities to be complied with for the importation of such goods into the territory of GB, it should be specified that these vary greatly depending on the category of controlled goods to be imported into the territory of Great Britain.

[198] In addition to these first two requirements, it should also be noted that eligibility for the use of delayed declarations was granted by HMRC after reviewing the recent compliance history of traders applying for delayed declarations.

In other words, traders with a poor compliance history could have been denied such authorisation.

This, in fact, is expressly stated in Regulation 29B (4)(a) of the Customs (Import Duty) Regulations 2018, which states that "*An HMRC officer may give a notice to a person if, in the opinion of the officer, the person ought not to be regarded as a fit and proper person for the purposes of this section.*"

[199] See Chapter 3, Regulation 36 of the Customs (Import Duty) (EU Exit) Regulations 2018.

In fact, once authorised by HMRC, the person who imported into GB still had to complete and submit a supplementary customs declaration within 175 days of importing the goods.
Importantly, in addition to the above procedure, the UK Government also provided for a second alternative that could be selected by a trader importing into Great Britain and this second procedure is called "Simplified Customs Declarations".
If the latter procedure was the one selected, the trader importing goods into GB from the EU was required to submit a simplified frontier declaration upon import, on which a limited and reduced amount of information was to be indicated compared to that which would otherwise need to be indicated in a full customs declaration[200].
As with the EIDR procedure, a supplementary customs declaration had then to be completed and submitted at a later date.
Having clarified this, it should also be specified that in the event that an economic operator decided to use one of these two procedures, the payment of any duties, due if for example the rules of origin were not complied with, was also deferred until the moment when the supplementary declaration was due[201].
That said, up to now, the new simplified procedures and customs formalities introduced at the first stage, i.e., on 1st January 2021, have been dealt with.
As mentioned, the Border Operating Model set the start of the second stage, which will be discussed below, on 1st January 2022.
Starting from this date, first of all, the possibility to benefit from delayed declarations introduced on 1st January 2021 has ceased and, therefore, the obligation to submit and fill in also for non-controlled goods a full customs declaration has been introduced which, inevitably, results in greater complexity for operators importing into Great Britain[202].

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[200] Border And Protocol Delivery Group, 2021, *The Border With The European Union*, p. 20, available at https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/1041528/2021_December_BordersOPModel.pdf [Accessed 21/03/2022]
[201] The postponement of the lodging of the customs declaration, as mentioned above, meant that the payment of any duty was also postponed until the declaration was lodged.
For this purpose, i.e., in order to proceed with the payment of the deferred duty, it was mandatory for the importer using deferred declarations to have a Duty Deferment Account (DDA) in place.
For more information on how a DDA works, see HMRC, *How to use your duty deferment account*, available at https://www.gov.uk/guidance/how-to-use-your-duty-deferment-account [Accessed 21/03/2022].
Without a DDA, HMRC would not even allow traders to benefit from delayed declarations.
It should also be pointed out that if the GB-based business decided to operate through an intermediary, then it would clearly be this intermediary who would have to obtain permission from HMRC for delayed declarations and therefore also have a Duty Deferment Account.
[202] LEA R., 2021, The recovery continues, though growth moderates, *Arbuthnot Banking Group*, 31, p. 10.

It should also be mentioned that, as of 1st January 2022[203], new sanitary and phytosanitary controls and requirements have been introduced for specific categories of goods, including, for example, products of animal origin (POAO) or plants and plant products.

As of 1st January 2022, for the import of the above-mentioned goods into Great Britain, it has become indeed mandatory for the importer to submit import pre-notifications[204] in order to inform the relevant British authorities of the arrival of these consignments within a short period of time[205].

Having clarified this, it is now necessary to introduce what further requirements and controls will be introduced from the start of the third stage, which according to the Border Operating Model coincides with 1st July 2022.

Firstly, from 1st July 2022, the requirement to submit entry summary declarations for all consignments coming from the European Union will become effective.

Importantly, these entry summary declarations, which essentially contain safety and security information about the entry goods, will have to be lodged before the goods arrive in GB, as this will give the UK customs authority sufficient time to carry out appropriate risk analysis and identify potential threats associated with the consignments in arrival[206].

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[203] For specific categories of goods, classified as high risk, certain sanitary and phytosanitary controls were introduced already in the first stage, i.e., on 1st January 2021.
As a way of example, a valid Catch Certificate has become a requirement for importing fishery products and live bivalve molluscs into GB from 1st January 2021.
See Border And Protocol Delivery Group, 2021, *The Border With The European Union*, p. 79, available at https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/1041528/2021_December_BordersOPModel.pdf [Accessed 23/03/2022].

[204] Import pre-notifications have to be submitted by the importer via a specific UK software or system called Import of products, animals, food and feed system (IPAFFS).
Through this system, the importer can inform in advance the British authorities about the arrival of particular categories of goods, such as products of animal origin, plants or even live animals.

[205] It is important to note that the goods that will be subject to import pre-notification from 1st January 2022 are not limited to plants and animal products.
For example, within this category of goods the UK government also lists fishery products and live bivalve molluscs.
In other words, in order to import these latter products into GB it has become necessary, from 1st January 2022, to submit an import pre-notification, a requirement which, as seen, also applies to the import of animal and plant products.
That said, it is important to recall that fishery products and live bivalve molluscs are also subject to the requirement of a valid fishing certificate, to be presented from 1st January 2021.
For more information on all SPS controls that emerged on 1st January 2022, see Border And Protocol Delivery Group, 2021, *The Border With The European Union*, pp. 138-146, available at https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/1041528/2021_December_BordersOPModel.pdf [Accessed 23/03/2022].

[206] The UK's approach to safety and security declarations is in line with the World Customs Organisation's SAFE Framework, first adopted by WCO members in 2005.
The main purpose of the SAFE framework is to encourage the development of security standards in the transnational movement of goods and also to promote closer cooperation between business and customs.
That said, according to the three-staged approach established in the Border Operating Model, safety and security declarations are not required for the importation of goods from the EU into the territory of Great Britain until 30th June 2022.

In addition to this, from this date, additional requirements and documentary obligations will be necessary for goods such as plants or products of animal origin, already subject, as seen, to the obligation of import pre-notification from 1st January 2022.

From 1st July 2022, essentially, the main requirements that will come into force for these categories of goods are two.

Firstly, it will become mandatory to accompany these consignments with a health certificate stating that the products meet the GB health requirements.

This certificate will have to be issued by the competent authority of the exporter's country to the EU exporter[207].

In addition, as of 1st July 2022, plants or products of animal origin will start to be subject to physical and documentary checks at GB Border Control Posts[208], and no longer at the place of destination as was the case until 30th June 2022.

That said, up to this point the provisions of the Border Operating Model have been analysed and deepened with reference to the procedures and new customs requirements to be complied with to complete the importation into GB.

In light of these new requirements introduced in three stages, it is clear that the complexity and onerousness has undoubtedly and gradually increased for importing economic operators as from the end of the implementation period they have to comply, autonomously or more likely through

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From 1st July 2022, i.e., the third stage, however, it will become necessary to submit these declarations before goods from the EU enter the territory of Great Britain.
The responsibility for providing this safety and security information through the submission of entry summary declarations lies with the couriers.
However, with the consent of the courier, fulfilment of this requirement may be transferred to the trader.
In order for UK Customs to carry out a thorough risk assessment, the summary declaration must contain specific information including, for example, a description of the goods, the route taken by the goods before they arrive in the UK, the consignor, the consignee and the time of arrival of the goods.
For more information on UK entry summary declarations, see HMRC, *Making an entry summary declaration*, available at https://www.gov.uk/guidance/making-an-entry-summary-declaration [Accessed 25/03/2022].

[207] As a way of example, for products of animal origin and live animals, inspection of the consignment by an official veterinarian is required to ensure that the contents meet the health criteria of the country of destination.
In addition, it is worth mentioning that an individual health certificate is required for each species/type of product. Consequently, where a single import contains several consignments, then it may be that each requires a separate health certificate.
See Border And Protocol Delivery Group, 2021, *The Border With The European Union*, p. 150, available at https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/1041528/2021_December_BordersOPModel.pdf [Accessed 25/03/2022]

[208] Specifically, from 1st July 2022, goods subject to sanitary and phytosanitary controls will have to transit from the EU to the UK through a point of entry with an appropriate Border Control Post.
See SACCARDO N. et al., 2021, *Tax implications of Brexit, Bloomsbury Professiona*l, Kindle version, Chapter III, paragraph 3.21.
Essentially, Border Control Posts are points of entry into the UK that are appropriately equipped to carry out checks on specific goods, including products of animal origin and plants.
In other words, from July 2022, these types of goods will no longer be checked at the destination, but will have to be checked in advance at these equipped inspection centres called Border Control Posts.

a UK customs intermediary, with these new obligations that previously, i.e., until 31st December 2020, were not in place.
It is also worth mentioning that this complexity and therefore the obligations and new customs formalities mentioned above may fall on EU exporting companies, depending on the Incoterms clause agreed upon.
In fact, as seen in the previous chapter, if the clause agreed between the EU seller and the UK customer is identified in the DDP clause, then all the fulfilments and requirements necessary to carry out the importation of the goods into GB would have to be transferred to the EU exporter. In such a case, the EU exporter would therefore have to first take care, possibly relying on an EU customs agent, of the documentation and formalities to be fulfilled for the exportation of the goods[209] and in addition also of the documentation and customs requirements necessary to carry out the importation into GB.
It is worth mentioning that in order to comply with the UK provisions relating to the importation of goods into GB, EU exporters who will be identified as an Importer of Record under the agreed Incoterms clause may however decide to rely on a UK-based customs agent to carry out customs formalities in Great Britain, although this inevitably results in an additional source of cost.

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[209] From 1st January 2021 economic operators established in the EU who export goods to Great Britain will have to comply, in order to complete the export operation, with the documentary obligations and requirements set out in the Union Customs Code.
In other words, first of all it becomes necessary for an economic operator established in a member country to apply to the customs authorities of the state of establishment for an EU EORI number, in order to proceed with identification for customs purposes in the EU.
In addition, exports of goods to Great Britain must necessarily be accompanied by an EU customs export declaration.
This is expressly provided for in Article 158 (1) of the UCC, whereby *"All goods intended to be placed under a customs procedure, except for the free zone procedure, shall be covered by a customs declaration appropriate for the particular procedure."*
More specifically, with reference to the formalities to be completed prior to the export of goods out of the territory of the union, Title VIII (Goods taken out of the customs territory of the Union) of the UCC, Article 263(1) provides that *"Goods to be taken out of the customs territory of the Union shall be covered by a pre-departure declaration to be lodged at the competent customs office within a specific time-limit before the goods are taken out of the customs territory of the Union. "*
Article 263(3) then expressly provides that the pre-departure declaration mentioned in paragraph 1 may take the form of a customs declaration.
In addition to obtaining an EORI number and lodging a customs export declaration, it may also be necessary from 1st January 2021 to lodge an exit summary declaration.
Article 271 of the UCC, in fact, states that *"Where goods are to be taken out of the customs territory of the Union and a customs declaration or a re-export declaration is not lodged as a pre-departure declaration, an exit summary declaration shall be lodged at the customs office of exit."*
The definition of exit summary declaration is set out in Article 5(10) of the UCC, which states that *""exit summary declaration" means the act whereby a person informs the customs authorities, in the prescribed form and manner and within a specific time-limit, that goods are to be taken out of the customs territory of the Union;"*.
Importantly, such EU export requirements have become all effective on 1st January 2021, and not in a deferred manner, as the BOM and the three-staged approach only applies to imports of goods into GB coming from the EU.

In this respect, it is also important to note that on specific occasions the appointment of a UK customs intermediary is mandatory for an EU exporter, and this was the case, for example, until 1st January 2022 in order to take advantage of the benefits provided by the delayed declarations mentioned above.

In fact, the eligibility to use delayed declarations was limited exclusively to businesses established in the UK[210] and, therefore, a Union seller, identified as the Importer of Record in GB by virtue of the agreed Incoterms clause, could clearly not benefit autonomously from such simplifications.

As a result, in this case the only option and solution available to the EU-based exporter, in order to avoid submitting a full customs import declaration at the point of entry, was to appoint and operate in Great Britain through a customs intermediary established in the UK, authorised by HMRC, that had to act indirectly[211], i.e., in his own name and on behalf of the taxable person established in the territory of the Community.

As may be inferred, such an appointment by a European business of a UK representative acting in indirect representation does not constitute a simple and immediate operation and, more importantly, is also associated with a certain onerousness incurred by the represented company by virtue of the joint and several liability to be assumed by the intermediary.

3.3.2 The Border Operating Model: exports of goods from Great Britain to the EU

In the previous section, the obligations and new customs formalities that have emerged for the importation of goods from the EU into Great Britain have been indicated and deepened, and, to this end, the three-staged approach established in the Border Operating Model has been presented.

At this point, it should be noted however that the three staged approach is only in place for imports of goods into Great Britain, which means that, instead, for exports from Great Britain to the EU all the new obligations and controls has started to take effect from the end of the implementation period, i.e., from 1st January 2021, and not in a deferred manner.

Having clarified this, these new customs requirements will be presented below.

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[210] See HMRC, *Delaying Declarations for goods brought into Great Britain*, available at https://www.gov.uk/guidance/delaying-declarations-for-eu-goods-brought-into-great-britain#:~:text=Contents&text=For%20goods%20brought%20into%20Great%20Britain%20(England%2C%20Scotland%20and%20Wales,to%20175%20days%20after%20import [Accessed 27/03/2022].

[211] Border And Protocol Delivery Group, 2021, *The Border With The European Union*, p. 19, available at https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/1041528/2021_December_BordersOPModel.pdf [Accessed 27/03/2022].

First of all, from 1st January 2021 a GB-based business needs to obtain a GB Economic Operator Registration and Identification number (EORI) in order to be able to proceed with the export of goods outside of Great Britain.

Apart from this first requirement, from 1st January 2021 most exports must be accompanied by an exit summary declaration[212] and, in addition, a GB-based economic operator is required to lodge and complete a full customs export declaration, on which the detailed characteristics of the goods in movement, such as their value and their customs classification, must be entered.

This is clearly not an easy and straightforward task, especially for companies that until 31st December 2020, conducting only intra-EU transactions, had never been faced with the obligation to submit this type of declaration.

In order to cope with this new complexity, which has inevitably arisen from the end of the implementation period, many GB-based companies have found it appropriate and more convenient to proceed with the appointment of a customs agent, so as to simplify and reduce to some extent the intrinsic complexity of the procedure of filling in and sending to the competent authorities the customs export declarations.

Having said that, these requirements that have arisen since the end of the implementation period are not the only obligations that have emerged, but in fact, from 1st January 2021 further requirements and formalities may be necessary depending on the type of goods being exported to the EU.

An example can be made in this respect with reference to goods covered by sanitary and phytosanitary controls, which include products of animal origin and plants and plant products, already mentioned in the previous paragraph.

Indeed, as of 1st January 2021, exports of plants or products of animal origin must also be accompanied by a health certificate stating that the items being transported meet and comply with EU health requirements.

It will therefore be the responsibility of the UK exporter to take steps in advance to obtain this licence, issued by the competent UK authorities.

[212] As mentioned above, under the three-staged approach of the Border Operating Model, entry summary declarations for goods coming from the EU into GB will have to be lodged as of 1st July 2022.
However, as the three-staged approach is only applicable with reference to imports into Great Britain, for exports to the EU the exit summary declarations containing security and safety information are not deferred but will become necessary on 1st January 2021.
In particular, it is important to underline that the requirement to provide safety and security information can also be fulfilled in the completion of the UK customs export declaration, without therefore, in this case, having to proceed with the completion of an exit summary declaration.
However, if a customs export declaration is not filed in advance, i.e., before the goods leave the territory of Great Britain, then a separate exit summary declaration may need to be submitted.

After obtaining this certificate, the said goods can then leave the territory of Great Britain and are subject to controls at the EU border.

To this end, they must enter EU territory via an EU Border Control Post properly equipped to carry out the necessary documentary, physical and identification checks.

In addition to this, the importer into the EU must then proceed with the completion and submission of an import-pre notification to alert the EU competent authorities of the arrival of products of animal or plant origin[213].

That said, having clarified up to this point the different obligations and requirements that have arisen from the end of the implementation period to carry out the export of goods from Great Britain to the EU, it should also be recalled that the documentary and declaratory obligations and responsibilities of the UK exporter are not always fixed and limited to those listed above, but clearly depend on the Incoterms clause agreed with the EU customer.

If, for example, the delivery terms of an export are arranged under the DDP clause, then the UK exporter will not only be required to fulfil, either independently or through an intermediary, the documentary and procedural obligations for the completion of the export transaction to the European Union.

In fact, in addition to obtaining a GB EORI number and completing a customs export declaration, it will also be necessary in this case for the British business to comply with the provisions of EU law concerning and regulating the import of goods into the EU from a third country.

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[213] It is important to specify that these three requirements, i.e., obtaining a health certificate, carrying out checks on the goods at EU Border Control Posts and completing an import pre-notification, apply to most products subject to sanitary and phytosanitary (SPS) controls that are exported from Great Britain to the EU, not only to products of animal origin or plant and plant products.
In fact, it is important to underline that, besides products of animal origin and plants, there are other products that the EU includes in the goods requiring SPS controls and that may be subject from 1st January 2021 to additional controls or requirements beyond the three indicated above.
An example in this sense is given by equines from Great Britain entering the territory of the EU.
In order to proceed with the export of equines to the EU, in fact, the exporter must also proceed before departure with the blood testing of animals.
The report of the analysis must then be approved by an Official Veterinarian.
In other words, the sanitary and phytosanitary controls emerging from 1st January 2021 for export of equines to the EU include four main requirements: the exporter must obtain a health certificate, the exporter must carry out a pre-export blood test on equines, the goods must enter the EU via a Border Control Post and the importer must complete an EU import pre-notification.
For more information on the EU requirements for the import of equines, see
Border And Protocol Delivery Group, 2021, *The Border With The European Union*, p. 222, available at https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/1041528/2021_December_BordersOPModel.pdf [Accessed 29/03/2022]
In light of this, it is therefore important that the exporter carefully analyses the EU requirements for the goods that he intends to export, as the requirements can of course vary depending on the goods.

In other words, the GB-based business, acting as the Importer of Record by virtue of the DDP clause, will also have to obtain an EU EORI code, if it does not already have one, and also complete and submit an EU customs import declaration[214] [215].

With regard to this, i.e., the lodging of the EU customs import declaration, it is important to emphasise that economic operators established outside the Union, which clearly also includes traders established in Great Britain, are excluded from the possibility of completing the EU import declaration autonomously.

In fact, this is expressly provided for in Article 170(2) of the Union Customs Code, which states that, except in specific cases, *"The declarant shall be established in the customs territory of the Union."*

By virtue of the provisions of the aforementioned article, from 1st January 2021 also for a GB-based business therefore arises the obligation to appoint a customs representative established in the EU who can carry out such customs import procedures.

It must also be made clear that this representative may not act as a direct representative, i.e., in the name and on behalf of the British trader, as in this case the declarant would again be the trader established in Great Britain.

As a result, the only possible solution for the GB-based business is to appoint a representative established in the EU to act as an indirect representative, i.e., in his own name but on behalf of the trader established outside the EU.

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[214] In addition, besides the EU customs import declaration, as of 1st January 2021 another documentary requirement arises for the entry of goods into the EU from Great Britain.

The arrival of goods from Great Britain destined to be imported into the EU territory, in fact, must be also communicated in advance to the EU customs authorities through the submission of an entry summary declaration (ENS) and this is expressly provided for in Article 127(1) of the UCC.

It is useful to specify that the ENS form can be filled in by the carrier or by other authorized persons, identified by Art. 127 (4) in the figures of the *"importer or consignee or other person in whose name or on whose behalf the carrier acts, or any person who is able to present the goods in question or have them presented at the customs office of entry"*.

As to the content of such declarations, they contain safety and security information about the goods arriving, thus allowing the Union customs authorities to carry out, on the basis of the information contained in the entry summary declaration, an appropriate risk analysis before the goods enter the EU territory.

This is expressly provided for in Article 127(5) of the UCC, which states that *"The entry summary declaration shall contain the particulars necessary for risk analysis for security and safety purposes."*

For more information on entry summary declarations see GELLERT L., 2017, The Entry Summary Declaration in the context of risk management, *Customs Scientific Journal*, pp. 27-34.

That said, in addition to the customs import declaration and the entry summary declaration, further documentary and reporting obligations would then have to be fulfilled, as of 1st January 2021, if the goods transported fall, for example, into the category of goods subject to sanitary and phytosanitary controls.

On this occasion, under the DDP clause, the UK exporter would not only have to obtain a health certificate from the UK competent authorities, but would also have to submit an import pre-notification, mentioned above, to the competent authorities of the Member State of destination.

[215] In addition to the obligation to lodge and complete the required import declaration, the responsibility and liability for the payment of any import duties would also be shifted to the UK seller under the DDP clause, as is also the case for the payment of VAT as discussed in the previous chapter.

However, it should be pointed out again that, under the conditions set out in the rules of origin of the Trade and Cooperation Agreement, duties are removed for goods originating in the UK moving to the EU, and vice versa.

In conclusion, it is important to specify that the appointment by a GB-based trader of an indirect representative in the EU is not a straightforward operation and, moreover, there is clearly a significant burden associated with the appointment of this intermediary.
The reason for this is to be found in the liability emerging on the part of the indirect representative, given that indirect representation entails joint and several liability for completing the customs declaration and paying the customs debt.
This is specifically provided for in Article 84 of the Union Customs Code, which states that *"Where several persons are liable to pay the amount of import or export duty corresponding to a customs debt, they shall be jointly and severally liable for payment of that amount"*.
Again, it is important to note that no import customs duty will however be due if the product exported by the other Party, which in this case is GB, complies with the rules of origin contained in the Trade and Cooperation Agreement.
That said, such rules will be analysed in detail in the following section.

3.4 Exemption from customs duties: The rules of origin in the Trade and Cooperation Agreement

As already noted, on 24th December 2020, the United Kingdom and the European Union signed the Trade and Cooperation Agreement, which established, as of 1st January 2021, a free trade area between the two parties.
Specifically, this agreement and the provisions contained in it have been fundamental to mitigate the negative impact of Brexit and to ensure a certain continuity of trade between GB and the EU, especially if considering the provisions of the Agreement that refer to customs duties.
In fact, in the formulation of the Trade and Cooperation Agreement, specific rules have been agreed and are expressly indicated that allow goods circulating between the EU and GB to enjoy an exemption on import duties[216], provided that certain conditions are met.

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[216] Customs duties, essentially, are taxes that are levied on goods imported in a customs territory and, as a general rule, must be paid by the importer at the time of presentation of the goods at customs.
Customs duties on importation are provided for in the Union Customs Code, Article 77 of which states that *"A customs debt on importation shall be incurred through the placing of non-Union goods liable to import duty under either of the following customs procedures:*
(a) release for free circulation, including under the end-use provisions;
(b) temporary admission with partial relief from import duty".
In UK domestic law, by contrast, the imposition of duty on goods imported from a third country is set out in section 1(1) of the Taxation (Cross-border) Trade Act 2018, under which *"A duty of customs (to be known as "import duty") is charged in accordance with provision made by or under this Part by reference to the importation of chargeable goods into the United Kingdom."*
In the light of the above, both parties therefore normally provide for the payment of import duties for goods coming from foreign countries.
As a result of the TCA, however, trade between the UK and the EU can take place at zero duty, which of course provides an enormous simplification as well as a lower burden by virtue of the duty exemption.

The prohibition of imposing duties on goods originating in either Party is expressly provided for in Article 21 of the Trade and Cooperation Agreement, under which *"Except as otherwise provided for in this Agreement, customs duties on all goods originating in the other Party shall be prohibited".*

From the provisions of the above-mentioned Article, it is clear that the duty exemption does not apply to all products moving between the EU and Great Britain, but only to goods "originating" in the other Party, i.e., only products that satisfy the rules of origin are therefore entitled to benefit from a full duty exemption[217].

Having clarified this, it is essential to first define what is meant by "originating" goods and, to this end, reference should be made to Chapter 2 (Rules of Origin) of the Trade and Cooperation Agreement.

Article 39 of Chapter 2, indeed, defines the criteria according to which goods can be considered as originating in a Party, i.e., originating in the UK or in the EU.

In order to present these criteria, Article 39(1) TCA states that *"For the purpose of applying the preferential tariff treatment of one Party to goods originating in the other Party in accordance with this Agreement, provided that the products meet all other applicable requirements of this Chapter, the following products shall be considered as originating in the other Party:*

(a) products wholly obtained in that Party within the meaning of Article 41;

(b) products produced in that Party exclusively from originating materials in that Party; and

(c) products produced in that Party incorporating non-originating materials provided they satisfy the requirements set out in Annex 3."

The simplest rule, therefore, defined in paragraph (a) of the above article refers to goods wholly obtained in the territory of either Party *"within the meaning of Article 41"*[218].

Specifically, reference is made here to goods that have a direct link with the territory, such as animals or plants born and raised there, or an indirect link by virtue of the intervention of a human activity.

In order to enjoy this exemption, however, specific rules of origin must be met, which are contained in Title 2 of the Trade and Cooperation Agreement.

Finally, it is important to note that if no agreement similar to the Trade and Cooperation Agreement had been signed or concluded in time before 31st December 2020, i.e., in the event of a hard Brexit, the payment of customs duties on imports of goods from the EU to Great Britain, or vice versa, would have been unavoidable.

[217] In case the products to be exported from the EU into GB, or vice versa, are qualified as originating in the EU or in the UK, then no customs duties will be applied.

See BARNARD C., & LEINARTE E., 2021, Movement of Goods Under the TCA, *University of Cambridge Faculty of Law Research Paper*, 31, p.6

As a result, the "only" costs to be taken into account by the economic operators involved would be those related to the need to carry out the relevant customs procedures and formalities already mentioned in section 3.3.

[218] Article 41 of the TCA, in fact, contains a list of which goods are to be considered as "wholly obtained" in a Party.

In the latter case, reference is made, for example, to products obtained from hunting or fishing conducted in that territory or the extraction of minerals from the ground[219].

These products are defined as "wholly obtained" and therefore enjoy duty-free treatment when exported from Great Britain to the EU or vice versa.

As an example, consider an export to the EU of a plant product grown or harvested in Great Britain.

This product, by virtue of Article 41(1) point (b)[220], falls into the category of goods wholly obtained in a Party, which in this case is Great Britain, and therefore the preferential tariff regime will apply to this import into the EU.

The second rule, defined in point (b) of Article 39(1), derives in a certain sense from the first one as it establishes that a finished product is to be considered as originating in a Party when its manufacture or production is obtained exclusively from the wholly obtained products mentioned in point (a).

Importantly, this second category of originating goods differs from the previous one in that it refers to finished products made of materials with several components.

In such a case, the traceability of each component is critical, as each material must be of EU or UK origin in order for the finished product to be considered an originating good.

Having clarified this, the last criterion set out in Article 39 (c) is undoubtedly the most intricate, complex and therefore the one to which economic operators will have to pay most attention.

Under Article 39 (c), products manufactured or produced in one Party with the use of non-originating materials, i.e., materials from third countries, are also entitled to duty exemption *"provided they satisfy the requirements set out in Annex 3"*[221].

In order to verify whether a finished product can be considered as originating even if non-originating materials are used, reference must therefore be made to Annex 3 which lists and subdivides products on the basis of their customs classification[222].

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[219] For more information on the list of products which are defined as "wholly obtained" under the TCA, see HMRC, *General rules to determine the origin of your products for trade between the UK and the EU*, available at https://www.gov.uk/guidance/general-rules-to-determine-the-origin-your-products-for-trade-between-the-uk-and-eu [Accessed 2/04/2022].

[220] As mentioned above, Article 41 states which products can be considered as wholly obtained in one part.
In point (b) of the above-mentioned Article, the *"plants and vegetable products grown or harvested there"* are expressly indicated.

[221] Article 39(c), Chapter 2, Section 1 of the TCA.

[222] Specifically, products are subdivided in Annex 3 on the basis of the Harmonised System (HS) classification.
The HS is an international nomenclature developed by the WCO and used by more than 200 countries.
This classification, which has contributed significantly to the international uniformity and standardisation of customs codes for the classification of goods, is also used in Annex 3 of the TCA.
For more information on the Harmonised System see LUX M., & MATT C., 2021, Classification of Goods: What are the Hurdles and Pitfalls in the Use of Automation or IT Support?, *Global Trade and Customs Journal*, 16(6), pp. 237-239.

In order to provide a clearer description of the requirement set out in Article 39 (c) and in view of its inherent complexity, it is appropriate to give an example below.
Suppose that a company established in the EU needs to sell and export a guitar to Great Britain. In order to verify whether this product qualifies and meets the rules for zero duty, the exporter must first associate the goods to be exported with their correct customs heading.
The correct customs heading, in this case for guitars, is 9207.
After correctly classifying the good, the economic operator shall proceed to check the specific origin rule of the product by referring to Annex 3 of the Trade and Cooperation Agreement.
Specifically, in Annex 3, under customs heading 9207, it is stated that the guitar, in order to be considered as originating in a Party, must be obtained in that Party by including non-originating materials for a maximum value of 50% of the ex-works price of the guitar[223].
If therefore, by virtue of the above, the ex-works price of the guitar obtained in the EU is €500, then the non-originating parts used may not exceed a total value of €250.
In the hypothetical case where non-original materials with a value of €300 were used, i.e., 60% of the guitar price, then the import of the article into Great Britain would not qualify for preferential tariff treatment, meaning that the entry into GB would be subject to full customs duties.
Having clarified this, it is important at this point to introduce what is laid down in Article 43 TCA, in that such Article sets out a further and extremely important condition that must be necessarily fulfilled in order for a finished product to be considered as originating in accordance with Art. 39(1) point (c).
In particular, Article 43 TCA states that *"Notwithstanding point (c) of Article 39(1)"*, a product cannot be considered as originating in one Party if the production in that Party only consists of insufficient working or processing[224] carried out on non-originating materials.

[223] Specifically, for HS code 9207, the words 'MaxNOM 50 % (EXW)' are shown in the column where the product-specific rules of origin are indicated.
In order to understand the meaning of this, it is necessary to refer to Annex 2 where the definitions of the various terms used in Annex 3 are given.
Note 4 of Annex 2 gives both the definition of EXW and the definition of MaxNOM.
The ex-works price (EXW) is defined as "*the price of the product paid or payable to the manufacturer in whose undertaking the last working or processing is carried out, provided the price includes the value of all the materials used and all other costs incurred in the production of the product, minus any internal taxes which are, or may be, repaid when the product obtained is exported*".
The term 'MaxNOM', on the other hand, refers to the *"maximum value of non-originating materials expressed as a percentage*" of the EXW.
In the light of the above, the expression "MaxNOM50 % (EXW)" means that the non-originating materials used in the manufacture of the guitar cannot account for more than 50% of the ex-works price.
[224] Article 43 TCA lists the operations deemed to be "insufficient".

In other words, it is not sufficient to comply with the product-specific origin rule contained in Annex 3 for the goods to qualify as “originating”, since the requirement laid down in Art. 43 must also be fulfilled.

In order to explain this point better, reference should be made to the previous example concerning the guitar.

Assume that the Union manufacturer imports all guitar components from China and that the value of these non-originating components does not exceed 50% of the guitar’s ex-works price[225].

The Union producer, however, carries out in the EU only a mere assembly operation of such parts, which constitutes an insufficient operation within the meaning of Article 43.

Article 43(1)(o), indeed, states that an operation of "*simple assembly of parts of articles to constitute a complete article or disassembly of products into parts"* is an insufficient operation.

By virtue of the above, even if the Union operator complies with the product-specific origin rule but carries out in the EU only operations which do not go beyond those listed in Article 43, then the product will in the end not obtain origin and will be subject to customs duties on entry into Great Britain[226].

Having clarified up to this point the rules and criteria defined in the TCA to establish whether a good produced or obtained in the UK or EU can be considered as originating in that Party, it is now necessary to deepen a further rule inserted in the Trade and Cooperation Agreement.

This rule is called the rule of full bilateral cumulation[227] and its purpose is to make more elastic the discipline on the Rules of Origin mentioned above, as it allows economic operators of the UK and the EU to obtain more easily and with greater possibility a duty exemption.

In practice, this rule is laid down in Article 40(1) of the TCA according to which *"A product originating in a Party shall be considered as originating in the other Party if that product is used as a material in the production of another product in that other Party."*

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[225] As mentioned above, it is important to recall that the specific rule of origin for guitars is contained in Annex 3, under the HS code 9207.

The rule specifically states that non-originating materials may not account for more than 50% of the ex-works price, i.e., "MaxNOM 50% (EXW)".

[226] In this case, it has been assumed that all guitar components are imported from China and even if the product specific rule is met, only a mere assembly operation is carried out in the EU and therefore the product does not acquire origin in the EU.

However, it is worth emphasising that if some of the components are produced in the EU and others are purchased from China, provided that the product-specific rule is still satisfied, then the guitar would acquire EU origin because at least one substantial operation, i.e., the production of EU components, is carried out in the EU.

[227] The rules on cumulation may differ according to the conditions and criteria that goods must fulfil to be considered as originating in a party.

For example, there are regional cumulation rules, diagonal cumulation rules, full cumulation rules, multilateral cumulation rules and bilateral cumulation rules.

The latter as stated are contained in the Trade and Cooperation Agreement.

The cumulation rule is then not limited to materials, but also to the stages of production, and in fact Article 40(2) provides that *"Production carried out in a Party on a non-originating material may be taken into account for the purpose of determining whether a product is originating in the other Party."*

The rule of cumulation, therefore, is bilateral in that it applies between the two contracting partners, i.e., the UK and EU, and full in that it involves both materials (Art. 40(1)) and manufacturing processes (Art. 40(2))[228].

As it was done above, it is appropriate to present some practical examples in order to deepen the cumulation rule just mentioned.

To this end, consider the case of an exporter established in Great Britain who intends to export a bicycle to the EU.

First of all, this item must be correctly classified under its customs heading, which for bicycles is 8712.

Next, the trader must check the specific rule of origin for this product and, in order to do so, must check what Annex 3 provides for customs heading 8712.

By virtue of Annex 3, a bicycle acquires origin if the value of the non-originating materials used does not exceed 45% of the ex-works price of the finished product.

Having established this, the cumulation rule in Article 40(1) essentially states that if the UK manufacturer used components originating in the EU in the manufacture of the bicycle, those components would not be considered "non-originating" for the UK manufacturer.

In other words, by virtue of Article 40(1), goods originating in the EU when used in the manufacture of a UK product are also deemed to be of UK origin.

Clearly, this also applies if an EU operator uses materials of UK origin in the manufacture of a product.

Having established this, going back to the previous example of the bicycle, suppose that the price of the finished good is €300.

In this case, under the specific origin rule, a maximum value of non-originating materials of €135 could be used.

By virtue of the cumulation rule in the TCA, if EU-originating materials with a value of €200 were used in GB in the manufacture of the bicycle, the product-specific origin rule would not be affected since those materials would be deemed to have obtained UK origin, under Art. 40(1).

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[228] SWINBANK A., 2021, Some lessons that might be learnt from Brexit Britain's trade negotiations with the European Union, *Journal of World Trade*, 55(4), p. 541.

That said, as mentioned above, the cumulation rule laid down in the TCA is full, which means that it also applies to production processes under Art 40(2), and not only to materials.
In order to better explain this concept, consider an economic operator established in the EU who wants to export a men's shirt to Great Britain.
The correct customs heading for this item is 6205, and the specific origin rule associated with this customs code provides that the product may be considered as originating in a Party if the weaving combined with the making-up, including cutting of the fabric, is carried out there.
By virtue of the cumulation rule set out in Art 40(2) of the TCA, if the weaving had taken place in the UK and the making-up in the EU, then the re-export by the EU trader to GB would not be subject to duty.
In other words, the processing steps required by the rule of origin in Annex 3 are in this case respected, as under the rule in Art 40(2) the processing carried out in the two partner countries can be cumulated.
Importantly, the rule of bilateral cumulation has, however, limitations in line with those defined in Article 43 TCA with respect to insufficient operations[229].
Article 40(3), in fact, expressly states that *"Paragraphs 1 and 2 do not apply if the production carried out in the other Party does not go beyond the operations referred to in Article 43."*
Accordingly, consider again the example of the bicycle and the shirt given above.
In the case of the bicycle, it was assumed that the article with a value of €300 was made in the UK also from material originating in the EU with a value of €200.
As mentioned above, due to the cumulation rule in Art. 40(1), the specific origin rule for bicycles was not affected in this case.
However, if all the components of the bicycle are imported from the EU and the UK operator carries out only a mere assembly operation of these materials, then the bicycle would no longer acquire UK origin and would therefore be subject to import duties when it enters the customs territory of the EU.
This is because the assembly operation is referred to in Article 43 as an insufficient operation.
The same applies if considering the example of the men's shirt.
In this case, it was assumed that the shirt was first woven in Great Britain, then made-up in the EU and then re-exported to the UK.
As said, by virtue of the rule of cumulation laid down in Art. 40(2), such a product still satisfied its specific origin rule.

[229] In other words, if a sufficient processing is not carried out in the exporting party, then the cumulation rules do not find application.
See FUSACCHIA I., SALVATICI L., & WINTERS L. A., 2022, The consequences of the Trade and Cooperation Agreement for the UK's international trade, *Oxford Review of Economic Policy*, 38(1), p. 32.

However, let us now assume that the shirt had been woven and made-up in the UK and then imported into the EU.
Here it is only washed and ironed and then re-exported to Great Britain.
In this case, the goods would be subject to duty on importation into Great Britain, and the reason for this is that no operations beyond those deemed insufficient in Article 43 were carried out in the EU.
Indeed, Article 43(c) and (d) states that ironing and washing are to be regarded as insufficient operations.
That said, up to this point the numerous regulatory provisions contained in the TCA which set out the criteria under which goods can be considered as "originating" have been presented in detail.
In the light of the analysis made here, it is clear that these rules, while undoubtedly leading to trade advantages between the UK and the EU, are nevertheless characterised by a high degree of technical complexity and it is because of this inherent complexity that economic operators wishing to benefit from the preferential treatment must pay close attention to such rules.

3.4.1 Procedure for applying for preferential tariff treatment

In the preceding paragraph, a detailed presentation was made of the rules and criteria which, if met, confer originating status on the goods and thus the possibility of benefiting from preferential tariff treatment under the Trade and Cooperation Agreement.
However, in order to benefit from duty-free treatment, it is not only and exclusively sufficient that the goods have acquired EU or UK originating status by virtue of the rules of origin laid down in Chapter 2, Section 1 of the TCA.
In fact, the application of preferential tariff treatment must also be expressly requested in accordance with the provisions contained in Section 2 (Origin Procedures) of the TCA.
In order to present how such a request can be made, it must first be established which of the two parties, i.e., the importer or the exporter, should proceed with the request for preferential tariff treatment.
In order to clarify this, paragraph 1 of Article 54 TCA states that *"The importing Party, on importation, shall grant preferential tariff treatment to a product originating in the other Party within the meaning of this Chapter on the basis of a claim by the importer for preferential tariff treatment."*
From the wording of the above provision, it is therefore clear that it is the importing Party that has to claim preferential tariff treatment for the products originating in the exporting Party and

also, it is the importing Party that assumes the responsibility for the correctness of the claim.[230]
Having clarified which Party has to proceed with such a request, Article 54 then goes on to detail how the request for preferential tariff treatment can be conducted.
In particular, paragraph 2 of Art. 54 states that *"A claim for preferential tariff treatment shall be based on:*
(a) a statement on origin that the product is originating made out by the exporter; or
(b) the importer's knowledge that the product is originating."[231]
There are therefore two alternative procedures, which will be analysed separately below, that may constitute a valid basis for a preferential tariff treatment claim.
The first one, defined in point (a) of Article 54(2), is identified in a statement on origin, i.e., a text by which the exporter declares that the product intended to be imported into the other Party complies with the rules of origin laid down in Chapter 2 of the TCA[232] [233].
Specifically, the definition and essential features of a statement on origin are set out in Article 56 (1) of the TCA, in the light of which *"A statement on origin shall be made out by an exporter of a product on the basis of information demonstrating that the product is originating, including, information on the originating status of materials used in the production of the product".*
The exporter is therefore responsible for the correctness of the information contained in the statement on origin[234].

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[230] This is expressly provided for in Article 54(1) of the TCA, according to which *"The importer shall be responsible for the correctness of the claim for preferential tariff treatment and for compliance with the requirements provided for in this Chapter."*
[231] Article 59 TCA then sets out the record-keeping requirements for the importer, whether he chooses to base his claim on a statement on origin or on his knowledge.
Article 59 paragraph 1 states indeed that *"For a minimum of three years from the date of importation of the product, an importer who files a request for preferential tariff treatment for a product imported into the importing Party shall keep:*
(a) if the request is based on a statement on origin, the statement on origin issued by the exporter; or
(b) if the request is based on the importer's own knowledge, any documents showing that the product meets the requirements for originating status."
In view of the above, the minimum time within which such documents or proofs must be maintained by the importer is three years.
Furthermore, Article 59 TCA, in addition to imposing record-keeping obligations on the importer, also provides that the exporter, where he has made out a statement on origin, must keep a copy of this statement for a minimum period of four years, and this is expressly provided for in paragraph 2 of Art. 59 TCA.
See FRUSCIONE A., 2021, Column: Customs and Trade in Italy and Europe: A Last-minute EU-UK Agreement, *Global Trade and Customs Journal*, 16(4), p. 177
[232] See FABIO M., 2021, *Brexit: Le regole commerciali tra UE e UK*, Milano: Wolters Kluwer Italia, pp. 132-133.
[233] It is important to emphasise that in the specific cases provided for in Art. 60 TCA the completion and presentation of an origin declaration is not required.
In particular, this Article refers to imports of small consignments intended for private, non-commercial use.
[234] It is important to note that where the statement on origin contains minor discrepancies or errors, this is not sufficient to lead to a rejection by the customs authority of the importing Party of the statement on origin.
In other words, minor errors or discrepancies do not affect the validity of the statement on origin as a basis for preferential tariff treatment.

Article 56 then goes on to provide further details about the drafting and presentation of this statement and, in fact, Article 56(2) states that *"A statement on origin shall be made out using one of the language versions set out in Annex 7 in an invoice or on any other document that describes the originating product in sufficient detail to enable the identification of that product."*

In the light of the above provisions, it follows first of all that the statement on origin may be made out by the exporter in any of the language versions included in Annex 7, which contains a total of 23 language versions.

It should then be specified that the customs authority of the importing Party does not necessarily require a translation of the statement on origin made out by the exporter.

In addition to the language aspect, Article 56(2) then defines another important aspect concerning the statement on origin, namely that it must be made out on an invoice or on any document provided that such document is sufficiently precise and detailed to enable the identification of the originating product.

With respect to this, the TCA does not contain a list of possible documents on which the statement on origin can be made out.

The only legal requirement under Article 56(2) concerns the degree of detail of the document on which the statement on origin is made out, i.e., it is not the nature of the document that is relevant but the detail of its content, which must be sufficient "*to enable the identification*"[235] of the originating product.

That said, another important aspect to be mentioned with respect to statements on origin concerns their limited temporal validity.

Statements on origin, in fact, are not valid for an indefinite period but, according to Article 56(3), *"A statement on origin shall be valid for 12 months from the date it was made out or for such longer period as provided by the Party of import up to a maximum of 24 months."*

The above-mentioned article therefore defines a time range, from a minimum of 12 months to a maximum of 24 months, and leaves it to the discretion of the two signatory Parties, i.e., the UK and the EU, to decide on the temporal validity of statements on origin.

Specifically, for the importation of goods into the EU, the statement on origin produced by the UK exporter is valid for 12 months while, on the contrary, for the importation into the UK the

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This is provided for in Article 57 TCA, according to which *"The customs authority of the importing Party shall not reject a claim for preferential tariff treatment due to minor errors or discrepancies in the statement on origin, or for the sole reason that an invoice was issued in a third country."*

[235] Art. 56(2), Chapter 2, Section 2 of the TCA.

maximum validity provided for in Article 56, i.e., 24 months, is granted to the EU exporter's statement on origin [236] [237].

That said, up to this point the first option provided for in Article 54(2), i.e., statement on origin, has been explored in depth.

In addition to this first option, Article 54(2), in point (b) also states that a claim for preferential tariff treatment may be based on *"the importer's knowledge that the product is originating"*.

In other words, the importer may decide whether to apply for duty-free treatment on the basis of a declaration by the exporter stating the origin of the products, which has been previously analysed, or, alternatively, on the basis of his knowledge that the product is originating.

With respect to this second alternative, i.e., the importer's knowledge, Article 58 (1) of the TCA provides that *"For the purposes of a claim for preferential tariff treatment that is made under point (b) of Article 54(2), the importer's knowledge that a product is originating in the exporting Party shall be based on information demonstrating that the product is originating and satisfies the requirements provided for in this Chapter."*

In view of the above, an importer, in order to be able to base a claim for preferential tariff treatment on his own knowledge, will have to make sure that he is in possession of the necessary information, which must be sufficiently precise to demonstrate that the product exported by the other party meets the requirements provided for in Chapter 2 of the TCA.

The source of such information is therefore not extremely important, it may in fact be either information from the exporter or the producer of the product, but rather its validity in proving that the product qualifies as originating[238].

It is then essential that the importer, if he decides to base his claim on this second option, has this information available before making his claim for preferential tariff treatment.

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[236] FABIO M., 2021, *Brexit: Le regole commerciali tra UE e UK*, Milano: Wolters Kluwer Italia*,* p. 135.

[237] Article 56(4) also specifies that a single statement on origin may apply to multiple shipments of identical products but, in this case the validity of the statement on origin may not exceed twelve months.

This, as mentioned, is laid down in Article 56 (4), according to which *"A statement on origin may apply to:*
(a) a single shipment of one or more products imported into a Party; or
(b) multiple shipments of identical products imported into a Party within the period specified in the statement on origin, which shall not exceed 12 months."

[238] As mentioned above, when the importer decides to base his claim for preferential tariff treatment on his own knowledge, he must be able to demonstrate that he has valid information proving the originating status of the product.

For this purpose, if, for example, the product to be imported is an originating product because it is wholly obtained in the other party, then the importer will presumably need to have documents proving the reference category of the product, i.e., fishing, mining or breeding, and the place of production.

If, on the other hand, the product is made up of originating and non-originating materials and the specific rule of origin provides that non-originating materials may not exceed a specified percentage, then the importer will need to have documents or information to prove and demonstrate the value of the final product and the percentage of non-originating materials used in the manufacture of the final product.

Indeed, an importer who has already requested preferential tariff treatment on the basis of his knowledge cannot then change his request and decide to base it instead on a statement on origin. In other words, if, upon verification, the information is not considered satisfactory to prove the originating status of the goods, then the importer cannot decide to base the same request on a statement on origin, which implies that in this case preferential tariff treatment is denied and customs duties apply.

This is why the importer, if he decides to base his request on his own knowledge, must be sure that he has sufficient information about the origin of the goods before making such a request.[239]

That said, up to this point the main features concerning the procedures for requesting preferential tariff treatment have been dealt with, i.e., it has been clarified which Party has to proceed with the request and also the two options constituting the basis on which a request can be made.

However, one last point remains to be elucidated, namely the time at which the claim must be made and presented.

To this end, Article 55(1) states that *"A claim for preferential tariff treatment and the basis for that claim as referred to in Article 54(2) shall be included in the customs import declaration in accordance with the laws and regulations of the importing Party."*

In other words, the claim is made at the time of importation and the basis for the claim for preferential tariff treatment, whether it is a statement on origin of the exporter or the knowledge of the importer, shall be included in the customs import declaration.

It is also important to mention that Article 55(2) contains an important derogation with respect to the timeframe provided for in paragraph 1[240].

Indeed, Article 55(2) states that *"Notwithstanding paragraph 1 of this Article, if the importer has not made a request for preferential tariff treatment at the time of importation, the importing Party shall grant the preferential tariff treatment and reimburse or remit any excess customs duty paid provided that*

(a) the request for preferential tariff treatment is made within three years from the date of importation [...];

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[239] It is important to note that obtaining such information is not always a simple and straightforward process, as the exporter may sometimes refuse to disclose to the importer information considered confidential.

In the above case, preferential tariff treatment can therefore more easily be claimed on the basis of the statement on origin and this is also expressly provided for in Article 58(2), according to which *"Before claiming the preferential treatment, in the event that an importer is unable to obtain the information referred to in paragraph 1 of this Article as a result of the exporter deeming that information to be confidential information or for any other reason, the exporter may provide a statement on origin so that the importer may claim the preferential tariff treatment on the basis of point (a) of Article 54(2). "*

[240] See FRUSCIONE A., 2021, Column: Customs and Trade in Italy and Europe: A Last-minute EU-UK Agreement, *Global Trade and Customs Journal*, 16(4), p. 177.

(b) the importer provides the basis for the claim referred to in Article 54(2); and

(c) the product would have been considered as originating and would have met all other applicable requirements under Section 1 of this Chapter had it been claimed by the importer at the time of importation."

In the light of the above, it therefore emerges that the claim by the importing Party may be made, provided certain conditions are met, even after importation up to a maximum limit of 3 years from the date of importation.

As said, in addition to this time limit, there are two other conditions, set out in Article 55(2), which must be fulfilled in order to benefit retroactively from preferential tariff treatment.

Point (c) of the said Article provides indeed that the importer's request must in any event be based on one of the two options indicated in Article 54(2) and, furthermore, the product should have complied at the time of importation with the requirements of Chapter 2, Section 1 of the TCA.

In other words, in order to benefit from a tariff exemption for goods previously imported, it is necessary that those goods were considered as originating at the time the importation took place.

3.4.2 Verification by the customs authority of the importing Party

In the preceding paragraphs, it has been firstly explained what is meant by originating goods and, in section 3.4.1, it has been then explained the procedure that the importing Party has to follow in order to submit a request for preferential tariff treatment.

It is worth noting at this point that once such a request is submitted, the competent customs authorities of the EU or the UK may carry out verification operations in order to assess whether or not the products being imported actually originate in the other Party.

In other words, the TCA grants the customs authority of the importing country, in Articles 61 and 62 TCA, a verification competence to ensure that the application of the duty exemption on a given product is indeed justified and correct[241].

That said, this verification process is a very complex one that varies depending on the basis chosen by the importer for the submission of its claim for preferential tariff treatment.

[241] The competence of the customs authority of the importing Party to proceed with the verification of the originating status of the product is recognised, as mentioned above, in Article 61 TCA, paragraph 1, which states that *"The customs authority of the importing Party may conduct a verification as to whether a product is originating or whether the other requirements of this Chapter are satisfied, on the basis of risk assessment methods, which may include random selection. Such verifications may be conducted by means of a request for information from the importer who made the claim referred to in Article 54, at the time the import declaration is submitted, before the release of the products, or after the release of the products."*

Paragraph 2 of the same article, i.e., Art. 61, then contains the information that the customs authority may request from the importer.

In other words, the way in which the verification will be carried out changes depending on whether the request is based on the knowledge of the importer or on a statement on origin of the exporter.

The two verification procedures will therefore be discussed separately below.

That said, where the request is based on the knowledge of the importer, then the verification can potentially take place in two steps: in step 1, the customs authority of the importing Party request from the importer the information detailed in Article 61(2)(b), i.e., *"information pertaining to the fulfilment of origin criteria"*.

If this information is not deemed sufficient by the customs of the importer's country, then stage 1 will be followed by stage 2 of verification.

In this second stage of verification, the competent customs authority will then proceed to ask the importer for further details, in accordance with Article 61(5)[242], in order to determine whether the goods are effectively originating in the other Party or not.

In the event that the importer is unable to respond to the customs authority's request for further details, then the verification process may result in the denial of preferential tariff treatment and, therefore, the application of customs duties in the EU or the UK.

That said, the above is the verification procedure if the importer had decided to base its request on its own knowledge.

If the importer had decided to base its request on a statement on origin made out by the exporter, then the verification procedure carried out by the customs authority of the importing Party would follow a different path, which will be discussed below.

In the first verification phase, the competent customs authority may first ask the importer for the statement on origin that formed the basis of its request for preferential tariff treatment.

In addition, the customs authority may then, pursuant to Article 61(2) (b) TCA, request from the importer further information *"pertaining to the fulfilment of origin criteria"*, in order to carry out a more thorough and detailed verification.

It should be noted, however, that the importer may not necessarily be in possession of such additional information, and this is specifically the case when the importer has nothing else but the declaration of origin completed by the exporter[243].

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[242] Article 61(5) of the Trade and Cooperation Agreement, indeed, expressly provides that *"If the claim for preferential tariff treatment is based on the importer's knowledge, after having first requested information in accordance with paragraph 1, the customs authority of the importing Party conducting the verification may request the importer to provide additional information if that customs authority considers that additional information is necessary in order to verify the originating status of the product [...]."*

[243] This is expressly provided for in Article 61(4), according to which *"If the claim for preferential tariff treatment is based on a statement on origin, the importer shall provide that statement on origin but may reply to the customs authority of the importing Party that the importer is not in a position to provide the information referred to in point (b) of paragraph 2."*

In this specific case therefore, i.e., where the customs authority needs additional information to the statement on origin but the importer is not in possession of such information, then the customs authority may request administrative cooperation from the customs authority of the exporting Party, and this is expressly provided for in Article 62(2)[244].

That said, where the customs authority of the importing Party requests administrative cooperation, then the customs authority of the exporting Party is expected to request the exporter to provide the documentation and information necessary to assess whether the exported product actually complies with the conditions and criteria of origin laid down in Chapter 2, Title 1 of the TCA.

Pursuant to Article 62(3), the customs authority of the exporting Party may also, in order to obtain the required documentation or evidence, visit the *"premises of the exporter, to review records and observe the facilities used in the production of the product."*

After having discussed in detail how verification may take place when the importer's claim is based on a statement on origin, it is worth pointing out that, in conclusion, the verification procedure following a request for preferential tariff treatment is undoubtedly an extremely delicate, complex and often lengthy procedure, regardless of whether the importer's request is based on a statement of origin or on his own knowledge.

In order to mitigate the risk that this procedure may take too long, the importer must therefore be prepared to effectively cooperate with the customs authority of his country, promptly submitting the proofs and the documents requested.

It is only in this way, indeed, that the verification by customs can be completed in the shortest possible time, without causing undue delay in clearing the goods.

That said, after having up to this point discussed in detail the new customs formalities between GB and the EU and the numerous provisions of the TCA relating to rules of origin, the last topic of this chapter will be discussed below.

In particular, the special case of Northern Ireland will be subject of the next section.

3.5 The Protocol on Northern Ireland: customs arrangements

The new procedural rules and customs formalities introduced up to this point, such as obtaining an EORI code or filling in customs declarations, apply specifically to trade in goods between Great Britain and the European Union, thus excluding Northern Ireland.

[244] Specifically, the time limit within which the request for administrative cooperation can be made is 2 years from the importation of the products or from the moment the importing Party has applied for preferential tariff treatment. This is set out in Article 62(2) of the Trade and Cooperation Agreement.

It is in fact important to emphasise that Northern Ireland represents a special case in this regard as, despite being part of the customs territory of the United Kingdom[245], it remains subject to EU customs rules from the end of the implementation period.
This is expressly provided for in the Protocol on Northern Ireland, Article 5(4), under which *"The provisions of Union law listed in Annex 2 to this Protocol shall also apply, under the conditions set out in that Annex, to and in the United Kingdom in respect of Northern Ireland."*[246]
As a result of the above, trade in goods between Northern Ireland and EU Member States remains subject to the same EU customs provisions as pre-Brexit, i.e., there are no customs formalities and the principle of free movement of goods continues to be guaranteed after the end of the implementation period.
Furthermore, in addition to the absence of customs procedures such as import or export declarations, the continuity of EU regulatory provisions in Northern Ireland means that there are no duties in trade with the EU and this is set out in Article 5(5) of the Northern Ireland Protocol[247].
It is therefore clear that transactions between the EU and Northern Ireland, being treated as intra-Community transactions, are extremely different from a customs point of view than transactions between Great Britain and the EU, which have been analysed in detail in the preceding paragraphs.

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[245] Article 4 of the Protocol on Northern Ireland indeed states that *"Northern Ireland is part of the customs territory of the United Kingdom."*
For more information see MCCRUDDEN C. (Ed.), 2022, *The Law and Practice of the Ireland-Northern Ireland Protocol*, Cambridge University Press, pp. 72-73.
[246] Importantly, Annex 2 of the Protocol on Northern Ireland lists more than three hundred EU measures which continue to be applicable in NI after 31st December 2020.
See BARNARD C., & LEINARTE E., 2021, Movement of Goods Under the TCA, *University of Cambridge Faculty of Law Research Paper*, *(31)*, p. 15.
Among the numerous pieces of EU legislation mentioned in Annex 2 of the Protocol, it is also included EU Regulation 952/2013 laying down the Union Customs Code.
The latter, which keeps its validity in Northern Ireland by virtue of Annex 2, constitutes as mentioned the most important piece of EU legislation in customs matters.
[247] MCGOWAN L., 2021, Northern Ireland after Brexit: Still Connected to the European Union, *Current Challenges of European Integration*, p. 159.
Specifically, Article 5(5) of the Protocol states that *"Articles 30 and 110 TFEU shall apply to and in the United Kingdom in respect of Northern Ireland. Quantitative restrictions on exports and imports shall be prohibited between the Union and Northern Ireland."*
Reference is therefore made to two Articles of the TFEU, namely Article 30 and Article 110.
Article 30 of the Treaty on the Functioning of the EU prohibits the imposition of customs duties on the movement of goods between Member States.
Article 110 TFEU, on the other hand, states that *"No Member State shall impose, directly or indirectly, on the products of other Member States any internal taxation of any kind in excess of that imposed directly or indirectly on similar domestic products. [...]".*
By virtue of Article 5(5) of the Northern Ireland Protocol these two articles continue to apply in Northern Ireland after the end of the implementation period, with the result that, under Article 30 TFEU, no customs duties are applied in trade in goods between Northern Ireland and the other Member States.

Having clarified these first important provisions of the Protocol on Northern Ireland regulating NI-EU trade, it is appropriate at this point to elaborate on the customs changes introduced on 1st January 2021 affecting trade between Great Britain and Northern Ireland.

The Brexit scenario, indeed, has created many difficulties and uncertainties for the economic operators involved in these intra-UK transactions.

First of all, as far as customs procedures and formalities are concerned, the obligation to lodge a customs declaration and any other formalities is not necessary if the goods are moved from Northern Ireland to Great Britain.

The absence in this case of customs procedures, however, is subject to the condition that the products from Northern Ireland are "qualifying Northern Ireland goods"[248], i.e., goods in free circulation in Northern Ireland[249].

If this condition is met, then there is no need for an export declaration in Northern Ireland, nor for an import declaration in Great Britain.

Furthermore, the movement of qualifying Northern Ireland goods in Great Britain results in exemption from the payment of customs duties.

The obligation to lodge a customs declaration and fulfil any other formalities, however, becomes necessary if products are moved in the opposite direction, i.e., from Great Britain to Northern Ireland[250].

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[248] The definition of "qualifying Northern Ireland goods" is set out specifically in UK law in "The Definition of Qualifying Northern Ireland Goods (EU Exit) Regulations 2020".

Measure 3(1) of those Regulations states that qualifying Northern Ireland goods "*means goods which:*
(a)meet or have met the condition at paragraph (2), or
(b)are NI processed products."

With reference to point (a), paragraph (2) states that the goods must be present in the territory of Northern Ireland but must not be subject *"to any customs supervision, restriction or control"*, i.e., the goods must be essentially in free circulation in Northern Ireland.

As regards the case referred to in paragraph (b) of Measure 3(1), goods processed in NI may be considered "qualifying Northern Ireland goods" provided that the components used in the manufacture of the finished product were all in free circulation at the time of processing.

For more information on the movement of qualifying Northern Ireland goods between GB and NI see HMRC, *Moving qualifying goods from Northern Ireland to the rest of the UK,* available at https://www.gov.uk/guidance/moving-qualifying-goods-from-northern-ireland-to-the-rest-of-the-uk#:~:text=Your%20goods%20will%20be%20qualifying,England%2C%20Scotland%20and%20Wales [Accessed 16/04/2022].

[249] This constitutes a significant trade facilitation aimed at protecting the internal British market.

Specifically, the prohibition on imposing barriers or preventing the entry of goods from Northern Ireland to the rest of the United Kingdom is expressed in Article 6(1) of the Northern Ireland Protocol, according to which *"Nothing in this Protocol shall prevent the United Kingdom from ensuring unfettered market access for goods moving from Northern Ireland to other parts of the United Kingdom's internal market. [...]"*.

[250] MCGOWAN L., 2021, Northern Ireland after Brexit: Still Connected to the European Union, *Current Challenges of European Integration*, p. 159.

The introduction of goods from Great Britain to Northern Ireland, indeed, entails the obligation to file an export declaration in GB and an import declaration in NI, just as if the goods were imported into NI from a foreign country, i.e., a non-EU country[251].

That said, with regard to the application of customs duties to goods entering Northern Ireland from Great Britain, reference must be made to the Protocol on Northern Ireland, Article 5(1), which provides that *"no customs duties shall be payable for a good brought into Northern Ireland from another part of the United Kingdom by direct transport, [...], unless that good is at risk of subsequently being moved into the Union, whether by itself or forming part of another good following processing."*

It follows, therefore, that the entry of goods from Great Britain into Northern Ireland will not tend to be subject to the imposition of customs duties, provided that such goods are not considered to be *"at risk of subsequently being moved into the Union"*. [252]

The two conditions which, if simultaneously fulfilled, automatically give the goods the status of "at risk", and thus eligible for customs duties, are set out in Article 5(2) of the Protocol.

Specifically, such Article establishes that goods can be considered "at risk" when they are subject to *"commercial processing[253] in Northern Ireland"* and when the additional criteria laid down by the Joint Committee are not met by the importer[254].

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[251] Importantly, in order to comply with these new customs requirements, the economic operator importing goods into NI must also proceed to obtain an EORI number beginning with "XI", which differentiates the EORI number in Northern Ireland from those issued in Great Britain, which begin with "GB".
See SANTACROCE B., 2021, Brexit, spazio al codice "XI" per le cessioni con l'Irlanda del Nord, *Il Sole 24 Ore.*

[252] MCGOWAN L., 2021, Northern Ireland after Brexit: Still Connected to the European Union, *Current Challenges of European Integration*, p. 159.

[253] Article 5(2) of the Protocol on Northern Ireland indicates what is meant by "processing", and for this purpose such Article states that this term refers to *"any alteration of goods, any transformation of goods in any way, or any subjecting of goods to operations other than for the purpose of preserving them in good condition or for adding or affixing marks, labels, seals or any other documentation to ensure compliance with any specific requirements."*

[254] The entry of goods into Northern Ireland from Great Britain, as mentioned above, results in the application of EU customs duties if the goods are considered to be 'at risk', i.e., if the goods are subject to commercial processing in NI and if additional criteria are not met.
It follows that if the goods are subject to processing in NI but the additional criteria set out by the Joint Committee are met, then these goods could still be declared "not at risk", thus avoiding the payment of customs duties on entry.
That said, in order to meet the above additional criteria, the importer must demonstrate that the annual turnover is below £500,000 and that the entering goods are intended for one of the approved purposes which include, for example, the sale of goods to final consumers in the UK or non-profit activities in NI.
By virtue of the above, the importer in NI who can demonstrate that the additional criteria are met, can declare the goods subject to processing in Northern Ireland as "not at risk", thus avoiding the incurrence of customs duties that would otherwise be due.
For more information on the additional criteria established by the Joint Committee and, in particular, on the approved purposes see SACCARDO N. et al., 2021, *Tax implications of Brexit, Bloomsbury Professiona*l, Kindle version, Chapter III, paragraph 3.25.

When both of these conditions are fulfilled, then the goods, as stated above, will be considered *"at risk of subsequently being moved into the Union"* and EU customs duties[255] will apply to the entry into Northern Ireland.

Conversely, where goods entering Northern Ireland from Great Britain are considered to be "not at risk", then, as mentioned in Article 5(1), no duty will be charged on entry[256].

That said, there are two cases in which goods entering Northern Ireland from Great Britain may be declared "not at risk" of entering the territory of the European Community.

In the first case, products can be considered "not at risk" if the EU duty that applies to their entry into NI is equal to 0[257].

In the second case, instead, goods can be qualified as not at risk of movement into the EU if the importer is able to demonstrate and prove that the goods have entered NI for the sale to final consumers in Northern Ireland or for business use in NI.[258]

As mentioned above, if the import into NI from GB falls within either of the above two cases, then the goods can be declared as "not at risk" without having to pay any duty in NI.

That said, this classification, which divides goods "at risk" from goods "not at risk", is not only applicable to products coming from Great Britain.

Indeed, also goods entering NI from outside the EU and GB, i.e., from the Rest of the World (Row), must necessarily be qualified as "at risk" or "not at risk" in order to determine which customs tariff to apply.

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[255] In other words, the imposition of import duty on goods considered "at risk" will follow and be calculated according to the EU customs tariff.
Indeed, if a good is considered to be "at risk", then there is a concrete possibility that the good is actually destined to enter the EU customs territory via Northern Ireland, and it is for this reason that the EU duty is levied when the good "at risk" enters Northern Ireland.

[256] MACMAOLÁIN C., 2021, Early Lessons From The EU/UK Brexit Negotiations: Implications For Ireland, *European Public Law*, 27(4), p. 633.

[257] This occurs if the goods coming from Great Britain are eligible for the preferential tariff treatment under the TCA, i.e., if the goods are of UK origin.

[258] In this case, the trader established in NI who imports these goods and wishes to declare them "not at risk" because of their consumption or end use within the territory of Northern Ireland, must apply and be registered in the UK Trader Scheme (UKTS).
Through the authorisation obtained from this scheme, the importer will in fact be able to self-declare the goods entering the country as "not at risk", thus ensuring that no EU duty is paid on goods coming from Great Britain qualified as "not at risk".
In other words, the trader established in NI or having a fixed establishment there, in order to be able to declare the goods "not at risk" must be registered in the UKTS and, of course, must be able to prove that the incoming goods will remain within the territory of Northern Ireland.
Relevantly, registration with the UKTS is not necessary if goods are declared "not at risk" as a consequence of the fact that the EU duty is equal to 0.
For more information on the UK Trader Scheme see HMRC, *Apply for authorisation for the UK Trader Scheme if you bring goods into Northern Ireland*, available at https://www.gov.uk/guidance/apply-for-authorisation-for-the-uk-trader-scheme-if-you-bring-goods-into-northern-ireland [Accessed 20/04/2022].

Accordingly, goods imported into NI from outside the EU and GB are deemed to be “at risk” if the two conditions set out in Article 5(2) of the Protocol, previously mentioned, are met simultaneously[259].

In addition to this rule, however, there is an additional one which states that if the applicable EU duty is greater than the UK duty by 3% or more, then goods imported into NI from outside GB and the EU are automatically defined as “at risk”[260].

As regards the possibility of declaring these products "not at risk", this possibility exists if the applicable UK duty is equal to or higher than the EU duty.

In the event that the EU duty applicable to the goods being imported is greater than the UK duty, it remains possible for the importer to declare the goods "not at risk", provided that the importer can demonstrate that such goods will be sold, or used for business purposes, in the territory of NI[261].

To conclude, in case the goods entering NI and coming from outside the UK and the EU are automatically qualified as “at risk” of entering the EU customs territory, then EU duty will find application, while if such goods can be declared by the importer as “not at risk”, then the import duty will be calculated on the basis of the UK Tariff.

Given the complexity of the above, below is a table designed to clarify which customs duty, i.e., UK duty or EU duty, applies to goods entering Northern Ireland from GB (Table 1) or from outside the UK and the EU (Table 2).

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[259] It should be recalled that, by virtue of Art 5(2) of the Protocol, if goods are subject to commercial processing in Northern Ireland and if the additional criteria set out by the Joint Committee are not met, then goods entering Northern Ireland from outside the UK or the EU will automatically qualify as "at risk" of entering the EU customs territory.

These two conditions, as seen, also apply in determining whether goods coming from Great Britain qualify as "at risk".

[260] HMRC, *Declaring goods you bring into Northern Ireland “not at risk” of moving to the EU*, available at https://www.gov.uk/guidance/check-if-you-can-declare-goods-you-bring-into-northern-ireland-not-at-risk-of-moving-to-the-eu [Accessed 23/04/2022].

[261] Where the EU duty is greater than the UK duty, as mentioned above, the importer may still declare the goods "not at risk" provided the importer is able to demonstrate that the incoming goods remain within the territory of Northern Ireland.

In order to do so, the importer needs to be registered with the UK Trader Scheme.

Importantly, however, the requirement remains that the EU duty cannot exceed the UK duty by 3 percentage points, as if the EU duty is greater than the UK duty by 3% or more, then the goods are automatically “at risk”.

	NI←GB	Customs duty
Automatically "at risk" of entering the EU	- commercial processing in NI and addition criteria are not met (Art. 5(2))	EU duty
Can be declared "not at risk" of entering the EU	- EU duty equal to 0 - sale to end consumers or business use in NI	No customs duty due

Table 1. Which customs tariff apply to goods entering NI from GB

	NI←RoW	Customs duty
Automatically "at risk" of entering the EU	- commercial processing in NI and addition criteria are not met (Art. 5(2)) - difference between EU duty and UK duty is greater than 3%	EU duty
Can be declared "not at risk" of entering the EU	- UK duty equal to or higher than EU duty - sale to end consumers or business use in NI	UK duty

Table 2. Which customs tariff apply to goods entering NI from the Rest of the World

Conclusions

Brexit, as amply demonstrated, has proven to be an event that has significantly changed and impacted the commercial and business practices to which British and EU economic operators were accustomed until 31st December 2020, the date on which the implementation period ended. In order to understand and examine these changes, this paper specifically looked at Brexit from a Tax Law perspective, and therefore focus was placed, as already mentioned in the introduction, on two of the aspects that have been most disrupted by the Brexit earthquake, namely VAT and customs.

As far as VAT is concerned, it was first shown that, by virtue of the combined provisions of Articles 126 and 127 of the Withdrawal Agreement, trade between the UK and other Member States still qualified as "intra-community" until 31st December 2020.

The natural implication of this is that until that date the numerous simplifications provided for in the 2006 VAT Directive continued to apply in GB-EU trade.

In line with this, for B2B intra-EU acquisitions of goods, the reverse charge mechanism applied, and VAT was therefore charged and deducted by the recipient of the goods.

For B2C transactions of goods, on the other hand, the place of supply was determined according to the combined provisions of Articles 33 and 34 of the 2006 VAT Directive, which laid down the functioning of the distance selling regime.

The simplification made available by this regime essentially was that if the seller established in one Member State, such as the United Kingdom, made distance sales of goods to another Member State for a value, in that current and in the preceding year, below a threshold set by the Member State of destination, then taxation could take place in the Member State of the supplier without therefore having to proceed with identification for VAT purposes in the Member State of destination.

As has been reported, these simplifications ceased to apply to transactions between the UK and the EU as of 1st January 2021 because, as of this date, the UK became a third country vis-à-vis the Union, which meant that transactions with the EU lost their nature as intra-Community transactions and became imports and exports instead.

Inevitably, this transition entailed a drastic change to the VAT rules that applied until the end of the implementation period, especially with regard to transactions of goods[262].

[262] With regard to the supply of services, the complexities that have arisen as a result of Brexit have in fact not been as significant as they have been for transactions of goods, and this is due to the fact that the rules determining the place of supply of services have remained practically unchanged since 1st January 2021.

In fact, as of 1st January 2021, VAT on the exchange of goods has become, as a general rule, payable at customs in the importing country, i.e., import VAT is generally due when the goods arrive in the EU or in the UK.

It is therefore the Importer of Record, identified according to the agreed Incoterms clause, who must take charge of customs clearance of the goods and payment of import VAT.

This has resulted in important and different complications and consequences for traders on both sides, i.e. Great Britain and the EU, especially if the agreed Incoterms clause is DDP.

In fact, it was pointed out in the paper that the UK's exit from the EU could result in exporters, when also identified as Importers of Record, having to register for VAT purposes in the State of destination of the goods, a requirement that could instead be more easily avoided until 31st December 2020 by virtue of the simplifications provided for in the EU.

In relation to the above, it has been pointed out in the paper that this complication, which arises as mentioned above if the exporter being identified as an IoR has to proceed with VAT identification in the State of importation, potentially places a much greater burden on British taxable persons exporting goods to the EU than the reverse, i.e., compared to the case where the importation takes place in GB.

This is due to the fact that there are twenty-seven EU Member States, and taxable persons established in GB exchanging goods with the EU, by virtue of the agreed Incoterms clause, may therefore be faced with the need to proceed in the worst-case scenario with twenty-seven VAT registrations, which entails a substantial burden as well as a very high administrative complexity.

Another critical issue analysed and explored in the paper concerns the procedure by which VAT identification can be conducted post-Brexit, and here again the analysis has revealed a greater

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Moreover, this reduced complexity is also due to the fact that a scheme called non-Union OSS was introduced in the EU on 1st July 2021, which provides significant simplifications for taxable persons not established in the EU who supply B2C services in the EU.

By joining this scheme, in fact, UK taxable persons are granted the possibility to centrally manage, through VAT registration in a single Member State of their choice, the payment of VAT due on the supply of all B2C services whose place of supply is identified in the EU.

The above-mentioned minor impact on services is also highlighted by taking into account that the value of export and import of services between the UK and the EU experienced a very contained decline in early 2021.

In fact, the value of exports of services from the UK to the EU fell by around 2% between the fourth quarter of 2020 and the first quarter of 2021.

The import of services to the UK from the EU, on the other hand, fell by around 8% between Q4 2020 and Q1 2021.

These numbers and statistics have been obtained through a personal reworking carried out on data made available by the Office for National Statistics on their website, specifically such data are available at https://www.ons.gov.uk/economy/nationalaccounts/balanceofpayments/datasets/tradeingoodsmretsallbopeu2013timeseriesspreadsheet [Accessed 7/05/2022].

As will be seen below, the impact of Brexit on the trade volume of goods has been far more significant.

complexity for traders established in the UK who have to proceed with VAT identification in the EU, compared to the opposite case.

This is due to the fact that each Member State has had and still has discretion as to how a taxable person established in a third country can carry out VAT identification in that specific Member State.

By virtue of this, in some Member States the appointment of a fiscal representative is compulsorily required, whereas in some Member States traders established in Great Britain continue to be given the much less onerous option of proceeding with direct identification for VAT purposes.

In the light of the above, a British taxable person who is required to proceed with VAT registration in one or more Member States will therefore have to do a careful analysis of the VAT jurisdiction in force in each individual Member State in order to ascertain whether or not the appointment of a fiscal representative is required.

For VAT identification in the UK of taxable persons established in the EU, on the other hand, both options remain available, and therefore the procedure for identification in the UK by EU taxable persons has practically not changed post-Brexit.

That said, another source of complexity following Brexit was identified in the paper with reference to VAT refunds and how these refunds can be claimed by an EU trader in the UK or vice versa.

This complexity arises from the fact that as of 1st January 2021, VAT refunds between the EU and the UK are no longer governed by Directive 2008/9/EC, under which the refund procedure could take place entirely through a fast-track, telematic procedure provided for within the EU.

The UK's exit from the EU has therefore meant that a VAT refund claimed by a UK taxable person for VAT paid in the EU is now subject to the provisions set out in the Thirteenth VAT Directive, whereas if a taxable person established in the EU is claiming the refund, then they must apply directly to HMRC, taking care to comply with the deadlines and procedures set out in the UK domestic rules.

In addition to the changes introduced in the VAT area, attention was also paid in the dissertation, as mentioned above, to the changes that Brexit introduced in the customs field.

With reference to this, the exit of the United Kingdom from the EU Customs Union entailed, as of 1st January 2021, the cessation of the principle of free movement of goods and the introduction of a border and controls on products moving between GB and the EU.

As a result, new customs procedures and formalities have arisen that were not necessary until 31st December 2020, such as the obtainment of an EORI number, the obligation to submit

customs declarations and the submission of additional specific documentation for goods subject to sanitary and phytosanitary controls.
As reported in the paper, however, these obligations did not come into force simultaneously in both the EU and Great Britain.
The EU countries, in fact, introduced all these new customs obligations and requirements as of 1st January 2021, but the same did not happen in GB for the import of goods from the EU as the British government opted for the introduction of these new customs obligations and formalities in a deferred manner, effectively offering an advantage to European exporting companies over British ones.
This is due to the fact that, as mentioned above, importing goods from the EU into Great Britain, at least until mid-2022, is not burdened with the same customs formalities and requirements that are instead in place from 1st January 2021 in the EU for importing goods from GB.
In addition to the considerations on the new customs procedures required for import and export as a result of Brexit, reference was also made in the paper to the rules of origin contained in the Trade and Cooperation Agreement, which, if complied with, allow economic operators on both sides to benefit from a duty exemption on the import of goods coming from the other party.
Although the provisions contained in the TCA recognise the possibility for the importer to request preferential tariff treatment, the inherent complexity of these rules is evident given the numerous and stringent criteria that must be met in order to qualify the goods as originating.
Specifically, it has been shown that the most intricate and complex scenario occurs when the finished product whose originating status is to be demonstrated is manufactured or produced with the use of non-originating materials and, in today's world, given the breadth and capillarity of supply chains, this scenario is common to countless companies established in the UK and in the EU.
Specifically, with reference to Article 39(1)(c) TCA, if the production of the finished product takes place by incorporating non-originating materials, then the economic operator established in the EU or the UK, in order to determine whether or not the product can obtain originating status, must pay attention to and jointly comply with the criteria laid down in Article 41 TCA, which refers to the product-specific rules of origin listed in Annex 3, and Article 43 TCA, which instead lists the operations recognised as insufficient that never allow a product to obtain originating status.
Determining the originating status of a product, especially if its production incorporates non-originating materials for the reasons listed above, therefore appears to be an extremely technical and complex operation and for this reason economic operators on both sides must inevitably

pay a high degree of attention to each and every detail contained in the rules laid down in the TCA.

The paper also pointed out that even the rule of cumulation provided for in Article 40 TCA, although it allows to safeguard to a certain extent the existing supply chains between the EU and the UK, presents several critical issues and limitations that may therefore jeopardise the advantages which such rule aims to guarantee.

A first limitation concerns the fact that the rule of cumulation is not triggered, i.e., it does not apply, if the working carried out in one Party on the materials originating in the other Party does not go beyond the operations defined as insufficient by Article 43 TCA.

A further limitation of the cumulation rule relates to its exclusively bilateral value, as the simplification provided for in Article 40 TCA only applies with reference to goods traded between the two signatory parties, i.e., the UK and the EU.

A company therefore that sources heavily from third countries will have to carefully consider whether it should reorganise its supply chain, as a product composed of non-originating materials, as mentioned above, is more unlikely to qualify for UK or EU originating status and thus benefit from duty-free treatment when imported into the other Party.

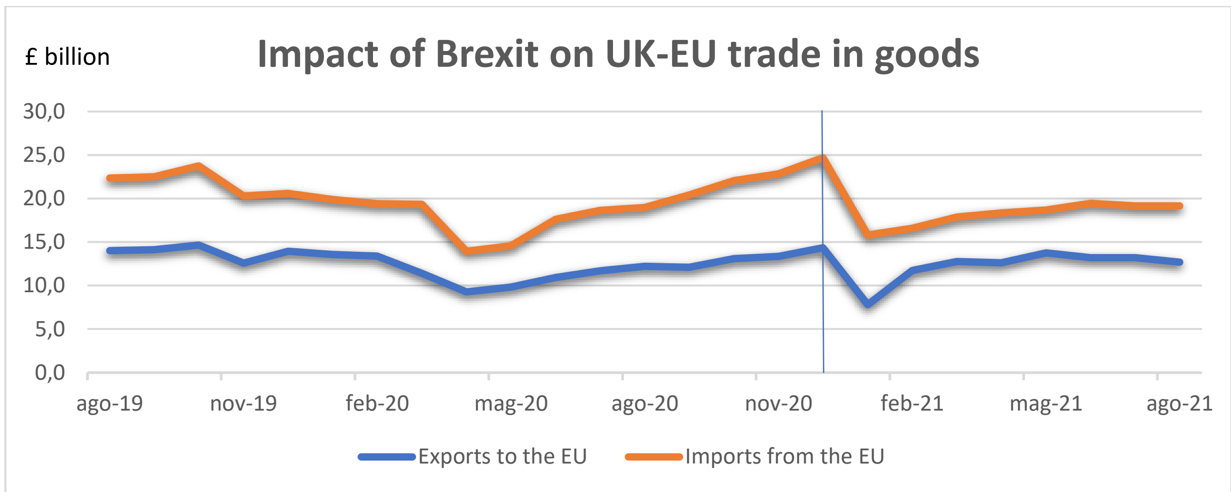
By virtue of all these new changes, most of which have arisen as of 1st January 2021, it is clear that the complexity has increased considerably for businesses compared to when the UK was still part of the EU.

This is also evidenced when considering and analysing the impact that Brexit has had on the UK's trade volume with the EU.

In order to illustrate this impact, below is a graph produced through a personal reworking of data published on 11 April 2022 by the Office for National Statistics.[263]

Specifically, this graph shows the trend followed from August 2019 to August 2021 by UK exports of goods to the EU and UK imports from the EU. The vertical blue line drawn marks 1st January 2021, the date when the implementation period ended.

[263] Data found on Office for National Statistics website, available at https://www.ons.gov.uk/economy/nationalaccounts/balanceofpayments/bulletins/uktrade/february2022 [Accessed 9/05/2022]



It is evident from the above that Brexit has effectively caused a substantial increase in complexity and uncertainty for traders involved in the movement of goods between the UK and the EU.

January 2021, the month in which the most significant VAT and customs changes came into effect, was in fact a destructive month for UK trade volumes with the EU, as in that month exports to the EU fell by around 45% compared to December 2020 values, while for imports the drop in January 2021 was around 35% compared to December 2020.

Relevantly, it is worth noting at this point that the larger percentage drop in exports than the drop suffered by imports could be a reflection of what was mentioned above, namely that the new VAT and customs requirements and obligations have fallen, at least immediately after the end of the implementation period, more heavily on UK traders exporting goods to the EU than the other way around.

In conclusion, it is necessary to specify that it is extremely difficult, if not impossible, to establish the precise percentage weight that the changes in customs and VAT have had on the reduced trade volume manifested in 2021 but, certainly, VAT and customs, being two aspects that generated considerable uncertainty and new significant complexities for businesses, have contributed decisively to the drop in imports and exports shown in the graph.

With reference to the future evolution of the relationship between the UK and the EU, the tendency is not to expect an upheaval involving VAT or the new customs procedures that came into force following Brexit, although it is worth noting and mentioning that there is a possibility, which has matured concretely following an event occurred in May 2022, that the entire TCA could be cancelled by either Party.

Before discussing and commenting on the effects that the suspension or termination of the Agreement could have on the UK-EU relationship, it is good to delve into the cause and

motivations that could lead to this catastrophic disruption, and, as mentioned, reference must therefore be made to what happened on 5th May 2022 in Northern Ireland.

On that day, in fact, parliamentary elections were held in NI, which saw the nationalist Sinn Féin Party triumph with about 30% of the vote, second being the Democratic Unionist Party (DUP) with about 21% of the vote[264].

By virtue of the current political system in Northern Ireland, Sinn Féin will therefore have to proceed to appoint the First Minister while the DUP will be responsible for appointing the Deputy First Minister.

In the event that one of the two parties decides not to proceed with the appointment of the relevant minister, however, then the government cannot be formed and this is precisely what is happening in Northern Ireland[265].

Indeed, the political leader of the Democratic Unionist Party, Jeffrey Donaldson, has expressly stated that there will be no appointment of the Deputy First Minister, and thus no formation of an executive with Sinn Féin, until London renegotiates with the EU political leadership the conditions set out in the Northern Ireland Protocol[266].

Specifically, the Unionist Party calls for a reform to the provisions establishing a customs border between Great Britain and Northern Ireland as the customs controls and procedures carried out on the movement of goods from GB to NI excessively restrict GB-NI trade, leading to Northern Ireland's isolation from the rest of the UK, according to Jeffrey Donaldson[267].

In order to resolve the political tension that arose following the 5th May 2022 election, London would therefore seem to have decided to support the demands formulated by the Democratic Unionist Party, and it is for this reason that in the coming weeks we could already expect a bill to be passed that would allow UK ministers to unilaterally amend certain elements of the Northern Ireland Protocol[268].

Specifically, unilateral modification action by the UK or the EU is technically legitimate under Article 16(1) of the Protocol, which states: *"If the application of this Protocol leads to serious economic, societal or environmental difficulties that are liable to persist, or to diversion of trade, the Union or the United Kingdom may unilaterally take appropriate safeguard measures.*

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264 LEACH A., et al., 2022, Northern Ireland election 2022 live results: assembly seats and votes, *The Guardian (online),* available at https://www.theguardian.com/uk-news/ng-interactive/2022/may/06/northern-ireland-election-2022-live-results-assembly-seats-and-votes [Accessed 12/05/2022].

265 ANDREWS C., 2022, NI election 2022: DUP blocks new NI government in protocol protest, *BBC (online),* available at https://www.bbc.com/news/uk-northern-ireland-61373504 [Accessed 12/05/2022].

266 RICE C., 2022, More of the Same? The Northern Ireland Assembly Election 2022, *Political Insight*, 13(1), p. 39.

267 CAMPBELL J., 2022, Why is the DUP against the Northern Ireland Protocol?, *BBC (online)* available at https://www.bbc.com/news/uk-northern-ireland-61366306 [Accessed 13/05/2022].

268 Ibid.

Such safeguard measures shall be restricted with regard to their scope and duration to what is strictly necessary in order to remedy the situation."

However, while for the UK government the prerequisites for triggering Article 16(1) are there, the same cannot be said for the EU, which considers that the changes requested by the UK to the Northern Ireland Protocol are too far-reaching and would lead to a substantial modification of the Protocol's provisions[269].

In light of this divergence between the two parties, therefore, should Article 16(1) really be triggered, the EU's response would be immediate, and in the worst-case scenario, in the event of escalation and escalating tension between London and Brussels, the EU might decide to avail itself of the clause contained in Article 779 of the Trade and Cooperation Agreement, which allows for a complete termination of the Agreement itself.

Article 779, in fact, states that *"Either Party may terminate this Agreement by written notification through diplomatic channels. This Agreement and any supplementing agreement shall cease to be in force on the first day of the twelfth month following the date of notification."*

Therefore, should this clause be exercised by the EU in response to the UK's unilateral amendment of the Northern Ireland Protocol, then the entire Trade and Cooperation Agreement would be considered terminated one year from the date on which the EU notifies this intention.

The effect of such a decision would undoubtedly be disastrous for UK-EU trade, especially due to the reintroduction of customs duties on goods traded between the two parties.

Trade volumes would therefore fall dramatically, and we could probably even see a greater vertical drop than the one in January 2021 shown in the graph above.

Although this remains the most extreme response in the hands of the EU, it is still a real threat and the decision to trigger Article 779 of the TCA will therefore certainly depend on the extent of the changes the UK makes to the Northern Ireland Protocol.

In my view, it is unlikely to escalate to such an extent that the EU would actually opt for this nuclear option[270], as the negative effects that would follow the termination of the TCA would be extremely significant for both sides.

Rather, the EU's threat to trigger Article 779 might just represent a strong deterrent to intimidate the British government.

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[269] CASTLE S., 2022, What's at Stake as U.K. and E.U. Wrangle Over Northern Ireland, *The New York Times (online)*, available at https://www.nytimes.com/article/uk-northern-ireland-protocol-eu.html [Accessed 14/05/2022].

[270] O'CARROL L., 2022, Three Ways EU could retaliate if UK ditches Northern Ireland Protocol, *The Guardian (online)*, available at https://www.theguardian.com/politics/2022/may/17/three-ways-eu-could-respond-to-uk-ditching-northern-ireland-protocol [Accessed 15/05/2022].

By virtue of the above, therefore, in my opinion the most likely option and scenario that could arise involves the EU and UK leadership proceeding with negotiations to jointly define possible simplifications in relation to the movement of goods from Great Britain to Northern Ireland, without, however, totally undermining or nullifying the customs border between these two UK territories.

Only in this way, i.e., if the interests of both parties are somehow satisfied, will it be possible to avert an EU response which, in the worst-case scenario, could as mentioned above result in the activation of the clause contained in Article 779.

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