# Continental Shift: No-deal Brexit & the law

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# Introduction

More than three years since the UK referendum on EU membership, and over six months on from the original withdrawal deadline, the UK has still not left the EU. However, since Boris Johnson replaced Theresa May as Prime Minister on 24 July 2019 there has been a shift, the government's stance has hardened and it has repeatedly refused to take a no-deal Brexit off the table.

The PM has reiterated time and time again that the UK will leave the EU on 31 October 2019, 'no ifs no buts', with or without a deal. This is in spite of Parliament passing legislation requiring the PM to seek an extension to the withdrawal period under Article 50 TEU unless Parliament passes a motion approving the UK's withdrawal from the EU (either with or without a deal) by a fixed deadline.

While the policy preference is to leave the EU with a re-negotiated deal in place, the government has upscaled its public campaign urging stakeholders to prepare for a no-deal outcome. LexisNexis has been working alongside industry leaders to unpack the potential impact of a no-deal Brexit, looking at the key issues, priorities and contingency planning and considering the possible effects on the legal profession.

This report collates a sample of our analysis on some of the key issues and impacted areas, cutting through the politics and focussing on the information required for practitioners to navigate a post-Brexit world.

*Interviews conducted by Aslak Ringhus, Diana Bentley, Jake Whitaker, Julian Sayarer, Kate Beaumont, Lucy Trevelyan, Stephanie Boyer and Susan Ghaiwal.*

*Disclaimer:*

*The views expressed by our Legal Analysis interviewees are not necessarily those of the proprietor.*

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# Brexit Timeline

23 June 2016
**UK votes to leave the EU**

24 June 2016
**PM David Cameron announces resignation**

13 July 2016
**Theresa May becomes PM**

29 March 2017
**UK gives notification commencing EU withdrawal under Article 50 TEU**

8 June 2017
**UK Parliament general election**

19 June 2017
**UK and EU launch Brexit negotiations**

21 June 2017
**Queen's Speech setting out the government's proposed policies and legislation for the extended 2017–2019 parliamentary session, with Brexit top of the agenda**

8 December 2017
**UK and EU reach agreement in principle on priority withdrawal issues**

26 June 2018
**European Union (Withdrawal) Act 2018 receives Royal Assent (fixing exit day in UK law and making provision for government to legislate in preparation for Brexit)**

14 November 2018
**UK and EU agreement in principle on the Withdrawal Agreement**

22 November 2018
**UK and EU agreement in principle on the political declaration on the framework for the future EU-UK relationship**

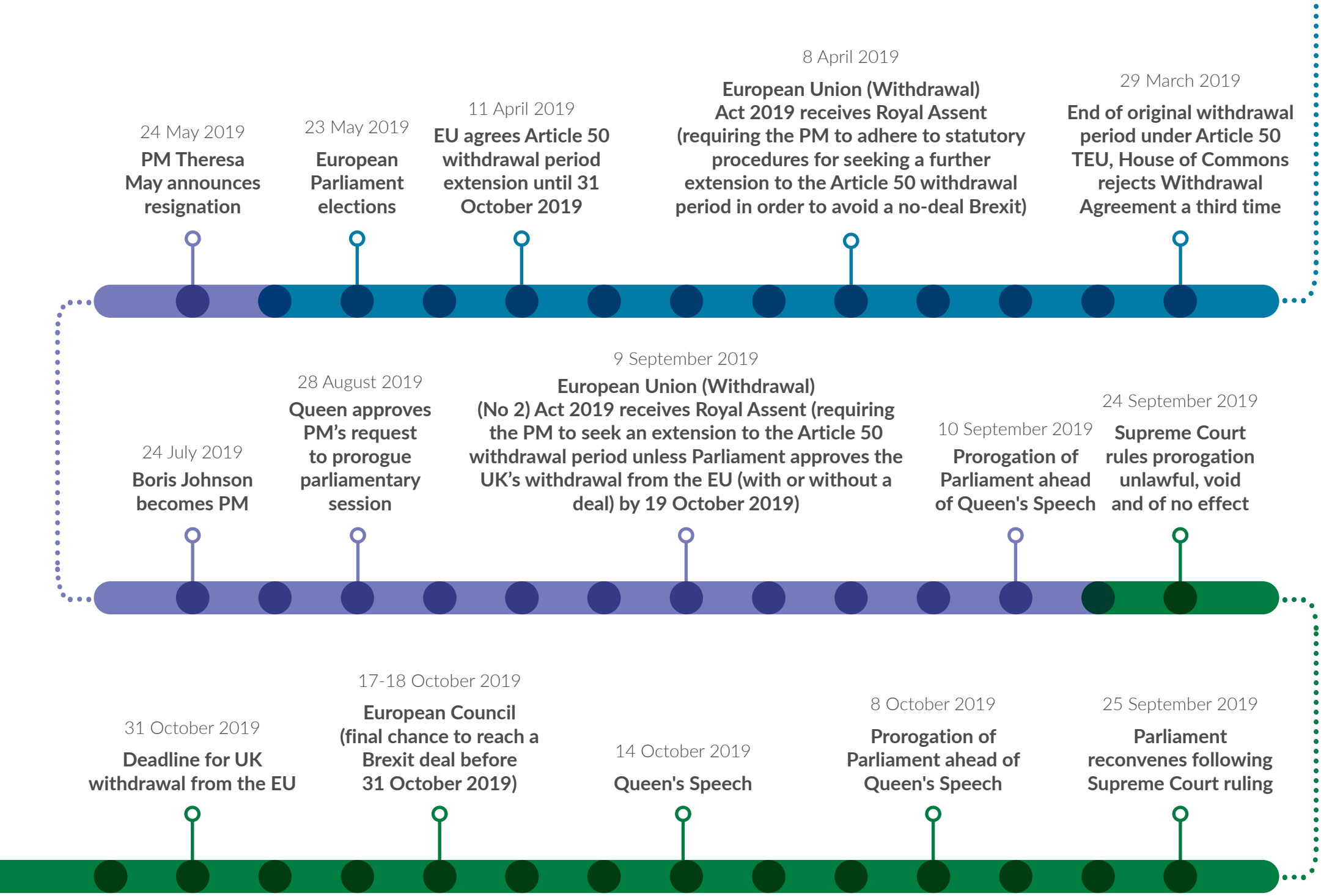
25 November 2018
**EU27 endorse Withdrawal Agreement and political declaration**

15 January 2019
**House of Commons rejects Withdrawal Agreement and political declaration in meaningful vote**

16 January 2019
**UK Government survives vote of no confidence**

12 March 2019
**House of Commons rejects Withdrawal Agreement and political declaration in second meaningful vote**

21 March 2019
**EU agrees Article 50 withdrawal period extension until 12 April 2019**


24 May 2019
PM Theresa May announces resignation
23 May 2019
European Parliament elections
11 April 2019
EU agrees Article 50 withdrawal period extension until 31 October 2019
8 April 2019
European Union (Withdrawal) Act 2019 receives Royal Assent (requiring the PM to adhere to statutory procedures for seeking a further extension to the Article 50 withdrawal period in order to avoid a no-deal Brexit)
29 March 2019
End of original withdrawal period under Article 50 TEU, House of Commons rejects Withdrawal Agreement a third time
24 July 2019
Boris Johnson becomes PM
28 August 2019
Queen approves PM's request to prorogue parliamentary session
9 September 2019
European Union (Withdrawal) (No 2) Act 2019 receives Royal Assent (requiring the PM to seek an extension to the Article 50 withdrawal period unless Parliament approves the UK's withdrawal from the EU (with or without a deal) by 19 October 2019)
10 September 2019
Prorogation of Parliament ahead of Queen's Speech
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31 October 2019
Deadline for UK withdrawal from the EU
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Queen's Speech
8 October 2019
Prorogation of Parliament ahead of Queen's Speech
25 September 2019
Parliament reconvenes following Supreme Court ruling

# No-deal Brexit: views in and around the UK

## Examining the impact of Brexit on UK devolution

Kenneth Campbell QC, fellow of the Chartered Institute of Arbitrators, of Arnot Manderson Advocates and Lamb Building, analyses the interaction between Brexit and UK devolution, the use of UK-wide common legislative frameworks to maintain harmonisation in the UK market, and the impact for the devolved administrations in Scotland, Wales and Northern Ireland.

**How does EU law interact with UK devolution and how does Brexit change this?**

All three UK devolution structures involve interaction with areas of EU law and EU competence, and that interaction is complex. As the devolution settlements are asymmetrical, a different range of powers is relevant to Scotland, Wales and Northern Ireland.

While agriculture, which is common to all three devolved nations, and in Scotland also fisheries, would be the most high-profile, there are other significant policy areas too.

In an exercise carried out in 2018, the UK government attempted to identify those areas of EU law that intersect with devolved competence in each devolved administration. An updated version of that exercise was published in April 2019. These policy areas were broken down as follows:

- 63 policy areas where no further action was required
- 78 policy areas where non-legislative common frameworks might be required
- 21 policy areas that were subject to more detailed discussion to explore whether legislative common framework arrangements might be required

In that final group of 21, it is likely that further detailed discussion will be required and future arrangements may include a mixture of reserved and devolved competence.

Within that listing, the UK government has also identified four policy areas that it believes are reserved or excepted in the Northern Ireland Act 1998 (NIA 1998). That is a significant reduction from the 12 areas identified in 2018.

Some aspects, particularly concerning agriculture, are controversial and involve ongoing discussion with the devolved administrations.

**How does Brexit and the government's approach to legislating for it impact on the UK devolution settlements?**

This was a subject of considerable political controversy during the parliamentary progress of what is now the European Union (Withdrawal) Act 2018 (EU(W)A 2018). In a joint statement, the First Ministers of Scotland and Wales described the Bill as a 'power grab' by the UK government.

That was founded on concerns about the structure of the Bill and the absence of a definitive consent requirement before UK legislation could be made in some areas of devolved competence, currently exercised in conjunction with EU institutions.

Although a number of changes were made to the Bill by the UK government during its parliamentary stages, and ultimately the Welsh Assembly (but not the Scottish Parliament) passed a legislative consent motion, some elements continue to be politically controversial.

There is not yet much detail about proposed legislation intended to regulate competences repatriated from the EU. An Agriculture Bill and a Fisheries Bill were before the UK Parliament at the time of prorogation on 10 September 2019. While these Bills were not carried over it is very likely that similar measures will be introduced in the new session. [Following the Supreme Court ruling that the prorogation had no effect, all Bills have been reinstated as they were prior to 10 September 2019.]

While there have been ministerial exchanges, there is an element of yet-to-be resolved inter-institutional disagreement between the UK government on the one hand, and the Scottish and Welsh administrations on the other.

**What are the relevant parts of EU(W)A 2018 concerning devolution, devolved legislative powers and UK 'freezing powers'?**

Each of the devolution statutes currently contains a requirement that the devolved legislature may not enact measures incompatible with EU law. EU(W)A 2018, s 12 modifies those provisions, removing the EU competence limitation and creating powers for the UK government to apply, by regulations, a temporary 'freeze' on devolved competence in specified areas, subject to the approval of the UK Parliament via the draft affirmative scrutiny procedure.

The effect of such a 'freeze' would be to retain the current parameters of devolved competence in relation to EU law for a period of up to five years. This is while the UK government and devolved administrations work together to design and implement the replacement UK frameworks. The powers to apply the 'freeze' will expire two years after exit day.

The powers to place a 'freeze' on devolved legislative competence are inserted into the relevant devolution statutes by EU(W)A 2018, s 12. Corresponding powers relating to devolved executive competence are inserted into the devolution statutes by EU(W)A 2018, Sch 3, Pt 1.

The relevant powers can be found in:

- sections 30A and 57 of the Scotland Act 1998 in relation to, respectively, the Scottish Parliament's and the Scottish government's competence
- sections 80 and 109A of the Government of Wales Act 2006 in relation to, respectively, the Welsh government's and the National Assembly for Wales' competence
- NIA 1998, ss 6A, 24 in relation to, respectively, the Northern Ireland Assembly's and the Northern Ireland minister's or department's competence

The mechanics of operating this process is controversial. Any such regulations, in their nature, are likely to engage the requirement for consent of devolved institutions (the Sewel Convention). However, this is not a precondition for operation of powers under EU(W)A 2018.

A further layer of tension is due to the fact that these provisions envisage operation by means of UK secondary legislation, thus offering less scope for scrutiny and the operation of the Sewel consent mechanism.

Before draft regulations are laid before the UK Parliament the responsible minister must have circulated them to the relevant devolved administration. Either the relevant devolved legislature must have made a decision on whether it agrees to the regulations being laid, or 40 days must have elapsed without such a decision being made.

If draft regulations are laid without the support of the relevant devolved legislature the UK government must publish a statement explaining why the minister has decided to lay the draft in the absence of consent. Then the UK government must lay before Parliament any statement provided by the relevant devolved administration that explain why consent was not given.

**What are UK-wide common legislative frameworks?**

In its provisional analysis published in March 2018 and updated in April 2019, the UK government identified areas of EU law that intersected with devolved competence. The largest number are related to Northern Ireland, closely followed by Scotland. Less than half of the areas intersect with devolved competence in Wales. This provisional analysis also sets out an assessment of the areas where the UK government considered there to be need for continued common rules or ways of working.

Both Scottish and Welsh governments have agreed that common frameworks will continue to be required in some areas. The principles agreed by the Joint Ministerial Committee (EU Negotiations) in October 2017 are relevant in this context. They are as follows:

- common frameworks will be established where they are necessary in order to:
  - enable the functioning of the UK internal market, while acknowledging policy divergence
  - ensure compliance with international obligations
  - ensure the UK can negotiate, enter into and implement new trade agreements and international treaties
  - enable the management of common resources
  - administer and provide access to justice in cases with a cross-border element
  - safeguard the security of the UK

- common frameworks will respect the devolution settlements and the democratic accountability of the devolved legislatures and will therefore:
  - be based on established conventions and practices, including that the competence of the devolved institutions will not normally be adjusted without their consent
  - maintain, as a minimum, equivalent flexibility for tailoring policies to the specific needs of each territory as is afforded by current EU rules
  - lead to a significant increase in decision-making powers for the devolved administrations
- common frameworks will ensure recognition of the economic and social linkages between Northern Ireland and Ireland and that Northern Ireland will be the only part of the UK which shares a land frontier with the EU. They will also adhere to the Belfast Agreement

**What is the legal and constitutional context for the frameworks?**

At present some areas of devolved competence fall within EU policy and legislative competence. That is one of the reasons why the devolution structures include limits on executive and legislative powers by reference to EU law. Thus, the UK's internal market is, in part, facilitated by EU regulation.

After the UK exits the EU the question of regulating the UK internal market becomes a domestic competence, though it is likely that there will remain an overlay of international standards in some areas. There will therefore be a question of managing boundaries between central and devolved authorities. That is one of the matters the common legislative frameworks are intended to address.

**The Cabinet Office has issued guidance and reports on the frameworks—what is the key guidance and what can lawyers learn from it?**

In terms of EU(W)A 2018, Sch 3, Pt 2, UK ministers are required to produce a report every three months setting out steps which have been taken by the UK government, whether or not in conjunction with devolved administrations, towards implementing arrangements which are to replace any relevant powers or retained EU law restrictions. Ministers are also required to report on regulations under EU(W)A 2018, s 12(9) which have been made in the reporting period.

Four reports have been produced thus far, covering the periods from 26 June to 25 September 2018, 26 September to 25 December 2018, 26 December 2018 to 25 March 2019 and 26 March 2019 to 25 June 2019.

There are few concrete lessons which can be drawn from these reports at this stage.

In all the reports the UK government speaks of active collaboration with the devolved administrations and indicates that it currently does not need to bring forward any regulations under EU(W)A 2018, s 12. It follows that, thus far, matters have been resolved by administrative harmonisation. There will inevitably come a point when hard legislation is required.

**What are the key legal sectors covered in the 21 priority areas and what progress has been made?**

It is convenient to set out the 21 priority areas. It will be evident that they can be grouped under the broader headings of agriculture and fisheries, food production and safety, the environment, chemicals, professional services, and public procurement:

- Agriculture and fisheries:
  - subsidies
  - fertiliser regulation
  - GMO regulation
  - organic farming
  - zootech
  - animal health and traceability
  - animal welfare
  - authorisation and use of pesticide products and the maximum residue levels in food
  - plants, seeds and propagating materials
  - fisheries management and support
- Chemicals:
  - chemicals regulation, including pesticides
  - regulation of the manufacture, authorisation and sale and use of chemical products primarily through Regulation (EC) 1907/2006 concerning the registration, evaluation, authorisation and restriction of chemicals
- Reciprocal healthcare:
  - Regulation (EC) 1408/71 and Regulation (EC) 883/2004 are the main pieces of EU legislation providing for reciprocal healthcare
- Environment:
  - environmental quality, including ozone depleting substances
  - implementation of the EU Emissions Trading System
  - waste packaging and product regulations

- Food production and safety:
  - food and feed safety and hygiene
  - food compositional standards
  - food labelling
- Mutual recognition of professional qualifications
- Directive 2006/123/EC on services in the internal market

**In practice how does Brexit and the introduction of UK-wide common frameworks affect the role and powers of the devolved administrations?**

Both the Scottish and Welsh governments have signalled their commitment to not create divergent policy in ways that would cut across future frameworks. This is where it has been agreed they are necessary or where discussion continues.

Northern Ireland continues to be hamstrung by the lack of devolved government. It is clear from the decision of the Court of Appeal of Northern Ireland in *Re Buick's Application for Judicial Review* [2018] NICA 26 that there are limits to the work which can be done by civil servants in the absence of an elected ministerial executive.

The UK government's response to the problem of absence of elected government in Northern Ireland is discussed below.

**The government is taking specific steps to legislate and prepare on behalf of Northern Ireland. How does this work and who is accountable in the event that any of these decisions are vulnerable to legal challenge?**

As a result of the litigation discussed above, in the autumn of 2018, the UK government introduced the Northern Ireland (Executive Formation and Exercise of Functions) Bill to Parliament. This received Royal Assent on 2 November 2018 and is designed to clarify the exercise of powers by civil servants in the Northern Ireland administration in the absence of elected ministers.

The Northern Ireland (Executive Formation and Exercise of Functions) Act 2018 (NI(EFEF)A 2018) does not give any new powers, but provides clearer boundaries for the exercise of existing powers in the absence of ministers. In addition, there will be supporting guidance which provides a framework for decision-making for Northern Ireland departments when judging if those powers should be used in the absence of ministers. NI(EFEF)A 2018 also enables public appointments to be made in the absence of Northern Ireland ministers, including reconstituting the Northern Ireland Policing Board.

NI(EFEF)A 2018 extends the period contained in NIA 1998 for Northern Ireland ministers to be appointed before the local elections later in 2019. As ministers were not appointed by 29 June 2017, NIA 1998 requires a further election before an executive can be formed.

NI(EFEF)A 2018, s 1 is intended to create a period in which an executive can be formed and talks can take place, by removing that current legal impediment to an executive being formed for a defined period.

Because there has been little visible progress towards formation of an executive in Northern Ireland, it has been necessary for Parliament to revisit the question and the Northern Ireland (Executive Formation etc) Act 2019 allows for staged extensions of time up to 13 January 2020.

NI(EFEF)A 2018 also requires the Secretary of State to publish guidance on the exercise of departmental functions including principles that senior officers in Northern Ireland departments must consider when deciding whether to exercise a function. Further, senior officers of departments are required to have regard to that guidance.

The guidance takes as its starting point that there are certain decisions which should not be taken in the absence of ministers. Senior officers in departments will be obliged to then consider whether there is a public interest in taking a decision rather than deferring it. The government also recognises that, in the absence of an executive, there will be some decisions that it should take. For example, setting out departmental budget allocations for approval by Parliament to ensure that public services continue to function.

In addition to this important enabling measure, Parliament has also enacted legislation to authorise raising and spending money in Northern Ireland, namely the Northern Ireland (Regional Rates and Energy) Act 2018, Northern Ireland (Regional Rates and Energy) Act 2019 and the Northern Ireland Budget Acts 2017 and the Northern Ireland Budget Acts 2018.

While NI(EFEF)A 2018 may have provided a degree of stability in the wake of the *Buick* case, questions remain. The decision of the UK Supreme Court in *Attorney General for Northern Ireland's reference of devolution issues to the Supreme Court pursuant to Paragraph 34 of Schedule 10 to the Northern Ireland Act 1998 (No 2) (Northern Ireland)* [2019] UKSC 1 indicated the sort of issue which could arise.

That application concerned a challenge to a decision on an infrastructure project. The Supreme Court allowed the challenge to proceed and noted that one of the questions was whether *Buick* and NI(EFEF)A 2018 had exhausted all the issues which might arise about executive powers. It remains to be seen whether similar challenges are made to other executive decisions, but it is certainly possible that these may arise.

# The view from Scotland

Brexit will have a significant impact on the UK's devolved administrations. Lynda Towers, director of public law at Morton Fraser, turns to Scotland and discusses the current situation and potential impacts of a no-deal Brexit.

**What are the specific priorities for Scotland in preparing for the no-deal Brexit scenario? How does the position differ to the rest of the UK?**

Scotland is a well-established devolved country which remains part of the UK. It has its own Parliament and particularly since the Scottish Independence Referendum, which ended in a vote for Scotland to remain part of the UK, has been enjoying increased devolved powers in tax, financial and social security matters. Scotland also voted clearly for remain in the EU Referendum and is portrayed by the current SNP government as being different from the rest of the UK as a result of that vote. A return of powers to Scotland which are currently being exercised by the EU is seen as positive for Scotland. However, the Scottish government remains unconvinced that the UK government is not indulging in a 'power grab' to the detriment of Scotland. This feeling is said to be more acute in Scotland which currently exercises wider devolved powers than in Wales and in Northern Ireland (which is not part of the discussions due to the lack of a governing executive at present). It is being portrayed as Scotland being dragged against its will out of the EU and being out of tune with the UK government and the rest of the UK. However, it may be difficult to argue that the concerns around immigration of agricultural workers and agricultural payments are not just as acute in the Welsh hill farms and the orchards of Kent as in the farm lands of Scotland.

**How far have preparations for no-deal progressed? What legislation, guidance etc has been finalised? What work still needs to be done?**

The Scottish Parliament has been making Brexit-related legislation over the last year, exercising powers under the European Union (Withdrawal) Act 2018 (EU(W)A 2018), to prepare for Brexit. This is technical legislation designed to make the statute book work in devolved Scotland on and after exit day. However, this exercise suffers from the same uncertainties which apply to the equivalent Westminster legislation. Without clarity on how a post-Brexit regime will operate, whether as a result of an agreement or in a no-deal scenario, final operational or procedural preparations cannot be made.

**Is there any outstanding UK-wide legislation or policy of particular importance for Scotland in a no-deal scenario?**

Scotland has substantial export markets to the EU including in agricultural products, fisheries and food and drink. While Scotch Whisky, as one of Scotland's major exporters, is used to operating in a world-wide market and is likely to cope well with any practical EU difficulties, the same cannot be said for most of the rest of these markets. Many of the companies affected are SMEs who will now have to deal with additional bureaucracy and form filling to ensure their goods can reach EU markets. Many of their products suffer from being time-critical.

For instance, delays in the clearing system at Dover or Calais may mean Hebridean lobsters will not reach Spain in premium condition with the resulting loss of income to the fishermen. Questions of applications of tariffs remain unclear for many Scottish exporters.

**What would change on day one of a no-deal Brexit in Scotland? What will be the priority matters for resolution after that?**

The Scottish government has provided some guidance relating to immigration status, university attendance and other affected matters. It has set up a ministerial group, various partnerships and a resilience room covering areas such as health, justice, transport, finance, marine planning, local authority planning and police preparations. These are designed to cover contingency planning in whatever form necessary in the event of a no-deal Brexit. It is also making preparations in the event of food and pharmaceutical shortages. It is running its own website setting out its preparations in the event of a no-deal exit. What the priorities on exit will be are likely to depend on how robust the systems prove to be and the degree of preparedness of those using the trade, import and export systems in Scotland and beyond.

What is clear is that the Scottish government is likely to use the Brexit difficulties Scotland may face to strengthen their political argument for a further Scottish Independence Referendum before the next Scottish Parliament election, which is due in May 2021.

**There have been a number of legal challenges concerning Brexit preparations brought in the Scottish courts—what is the current status and potential impact of this litigation?**

The Scottish courts have played their part in the Brexit narrative. The Lord Advocate intervened in the Supreme Court in *R (on the application of Miller and another) v Secretary of State for Exiting the European Union; etc* [2017] UKSC 5, [2017] All ER (D) 70 (Jan), which concerned whether Parliament had to be directly involved in the exercise of prerogative powers which would result in the UK's withdrawal from the EU being triggered under Article 50 TEU. While the court decided that it was not a matter solely for the PM, there was discussion in the judgment prompted by the Lord Advocate's submissions on the exercise of political conventions. The unanimous judicial comments on the effect of political conventions, even if apparently translated into legislation, have been featuring in the cases in the Court of Session and the High Court seeking to challenge the prorogation of the Westminster Parliament for a longer period than usual in September and October. On 11 September 2019 the Court of Session found the PM's advice to the Queen on prorogation to be unlawful. [Following appeal, the Supreme Court ruled that prorogation was unlawful, void and of no effect on 24 September 2019.]

When EU(W)A 2018 was going through Parliament in Westminster, the Scottish government decided to make Scottish equivalent legislation, the UK Withdrawal from the European Union (Legal Continuity) (Scotland) Bill, to deal with Brexit related amendments as required in Scotland as opposed to acting under EU(W)A 2018, for which it declined legislative consent. The Attorney General and the Advocate General for Scotland referred the Scottish legislation to the Supreme Court as being beyond the Scottish Parliament's legislative competence. Although the court held that the Bill as a whole was not beyond competence, key parts were beyond competence because they sought to modify either the Scotland Act 1998 or EU(W)A 2018. As such the Bill could not gain Royal Assent in that form *(Re the UK Withdrawal from the European Union (Legal Continuity) (Scotland) Bill—Reference by the Attorney General and the Advocate General for Scotland (Scotland)* [2018] UKSC 64, [2018] All ER (D) 58 (Dec)).

The *Wightman and Others v Secretary of State for Exiting the European Union* C-621/18, in which the Court of Justice decided that the notification under Article 50 TEU could be withdrawn, and which was vigorously opposed by the then UK government, also originated in the Court of Session. It is difficult to explain whether the increased constitutional interest in such matters in the Scottish courts is a result of a perceived greater flexibility in approach to such important constitutional matters by Scottish judges, a greater flexibility in the Scottish system of judicial review or just the right litigants and lawyers being in the right place in front of an available court at the right time. Whatever the reason the Scottish courts have shown themselves more than capable of dealing speedily and comprehensively with these difficult issues.


# The views from the island of Ireland

A no-deal Brexit will not just have implications for the UK, there will be knock on effects on other EU Member States and the rest of the world. Of particular interest are the effects on the island of Ireland, this is due to the unique situation in terms of the Northern Ireland/Republic of Ireland border. Dr Vincent Power, partner at A&L Goodbody, discusses the view from the Republic of Ireland and offers essential guidance for practitioners. Michael Black, employment director at Cleaver Fulton Rankin, turns to Northern Ireland and discusses the current situation and potential impacts no deal could have north of the Irish border.

**What are the specific priorities for the Republic of Ireland in preparing for the no-deal Brexit scenario?**

**Vincent Power (VP)**: 'Put simply—peace, people and trade. The Irish government's first priority is to avoid a no-deal Brexit altogether. If there is a no-deal Brexit, then Ireland would seek to minimise its implications. Nonetheless, for several reasons, those implications would be very significant. As the Irish Prime Minister rightly said on 9 September 2019 when his UK counterpart visited Dublin, there will be no 'clean break' Brexit. Ireland is the country most impacted by Brexit. That impact will be both positive and negative.'

**VP:** 'Ireland's first priority is to preserve peace on the island of Ireland including, in particular, Northern Ireland. The Irish Government is intent that a no-deal Brexit does not undermine the Good Friday/Belfast Agreement which is largely credited as having brought an end to most of the violence in Northern Ireland. That agreement took years to negotiate and has been refined since and while it is not perfect it has helped towards maintaining the peace. That first Irish priority has also become one of the EU's three key priorities (along with citizen's rights and the financial settlement). Ireland will have taken comfort from Michel Barnier's comments in early September 2019 that the EU will not proceed in a no-deal Brexit unless the three threshold issues are resolved first. These three issues are Irish peace, citizen's rights and the UK's financial settlement with the EU.'

**VP:** 'The second, and a related, priority is to ensure that the 310-mile border between Ireland and Northern Ireland remains open. This is for various reasons. Peace is the obvious one because border posts would become a target for terrorism. Trade is also another obvious one. But the reality is that cross-border travel is a way of life with many people living on one side and going to work, shop, school or utilise health services on the other side of the border.'

**VP:** 'In terms of trade, the UK is Ireland's largest export market while Ireland is the UK's fifth largest export market worldwide, so the Irish government is keen to maintain the open and free movement. A no-deal Brexit could roll back all of the advances made in terms of trade between Ireland and the UK including, in particular, the 1992 Internal Market Programme. Instead of cycling downhill, people in the UK trading with the rest of the world (and, equally, people in the rest of the world trading with the EU) will be cycling uphill in the rain and without a map.'

**How does this position differ to a negotiated exit?**

**VP:** 'A no-deal Brexit would be radically different from a negotiated exit. This is because a negotiated exit would resolve various (but not all) issues. In the draft Withdrawal Agreement, which was agreed in principle between the UK and the EU earlier in the Brexit negotiations, there is a special protocol relating to Ireland/ Northern Ireland which would allow many (but not all)

of the current rules to continue to apply pending the conclusion of a more permanent free trade agreement. So a deal helps reduce uncertainty. Even the threat or a possibility of a no-deal Brexit causes anxiety for everyone so this is less attractive than a negotiated exit. It is therefore not surprising that the UK and Irish Prime Ministers reaffirmed their wish for a negotiated exit.'

**Michael Black (MB):** 'In a negotiated exit there could potentially be no physical border on the island of Ireland. For an unspecified period of time, the UK could form a temporary customs territory aligned with the EU. In effect, the UK would remain in the EU customs territory on an interim basis.'

**What would happen to the specific/pre-existing arrangements in place between the UK and the Republic of Ireland eg Common Travel Area (CTA)? What will be the position for lawyers practising in the Republic of Ireland?**

**VP:** 'The CTA between Ireland and the UK is very likely to continue in existence post-Brexit. While the CTA has operated on a somewhat informal basis for decades with various agreements in, for example, 1923, 1952 and 2011, the CTA got a boost with a Memorandum of Understanding signed by the Irish and UK on 8 May 2019 in the full knowledge and expectation of Brexit. Therefore, the CTA is likely to continue in existence and provide a super layer of rights for Irish and UK citizens in each other's country irrespective of Brexit. EU law has explicitly recognised the existence of the CTA and both countries have stated their commitment to continuing the CTA.'

**VP:** 'On the position for lawyers practising in Ireland, while there has been some confusion, it is widely expected that solicitors on the roll in England and Wales will continue to be able to join the Irish roll (and vice versa). The Law Societies of Ireland as well as England and Wales have long had close bilateral arrangements. While there have been some uncertainties in recent times, the underlying bilateral relationship is strong and there is an incentive for both sides to keep reciprocal rights in place even if the scope of those rights (and their recognition by the EU) is a matter of debate.'

**What are the specific rules and responsibilities for the Republic of Ireland as regards to the land border with Northern Ireland?**

**VP:** 'Unless and until the UK leaves the EU, the border between Ireland and Northern Ireland remains entirely open in accordance with EU law. If the UK leaves with a deal then that deal, together with the underlying regime, will govern the land border. If there is no deal, then it is impossible to say at this stage how the land border would be regulated. However, if there is no-deal then it is quite likely that some temporary accommodation would be reached. It may be that the UK and the EU (including Ireland) could individually and unilaterally keep the border open such that there might be no agreement but there would be a set of unilateral declared positions.'

**What are the specific rules and responsibilities for Northern Ireland as regards the land border with the Republic of Ireland?**

**MB:** The rules and responsibilities for Northern Ireland regarding the land border with Ireland are multi-layered. As the UK and the Republic of Ireland are both still EU Member States, the four EU freedoms of capital, goods, people and services govern the land border presently.'

**MB:** 'Independent of EU membership, the CTA between the UK and Ireland is a long-standing arrangement which has been in place since the partition of Ireland. Currently, Irish and British citizens are able to move freely within the CTA zone. There are fears that a no-deal Brexit would adversely impact the Good Friday Agreement and the 12 cross-border areas of cooperation.'

**How far have preparations for no deal progressed in the Republic of Ireland? What legislation, guidance etc has been finalised? What work still needs to be done and what are the key dependencies?**

**VP:** 'The Irish government has made very significant preparations for the possibility of a no-deal Brexit. The Irish government has arranged for guidance to be given through a variety of agencies and bodies (eg Enterprise Ireland and InterTrade Ireland). In terms of legislation, the principal statute is the Withdrawal of the United Kingdom from the European Union (Consequential Provisions) Act 2019. It is impossible for businesses to be completely ready because it is not yet clear as to what would be the rule book.'

**VP:** 'The Irish government has said that all businesses—large and small—should take various steps to prepare for Brexit. These steps include understanding the new rules for UK importing and exporting, reviewing the supply chain and UK market strategy, being aware of possible changes to transport and logistics, reviewing all certification, contracts and data management and understanding regulation and licencing. Further, these steps include using government Brexit programmes and supports to manage cash flow, currency and ensure banking is in order.'

**How far have preparations for no deal progressed in Northern Ireland? What legislation, guidance etc has been finalised? What work still needs to be done?**

**MB:** 'The absence of an Executive in Northern Ireland has created a political vacuum as well as considerable Brexit uncertainty. On a national level, there has been little

guidance published by the UK government in relation to no-deal Brexit preparation. However, reports indicate that planning has been ramped up since Boris Johnson took over as Prime Minister, but various business organisations have commented that there has been insufficient external communication from the government in respect of no-deal planning and contingencies. In addition to the £4.2bn pledged by former prime minister Theresa May, Boris Johnson has pledged an extra £2.1bn in preparation for leaving the EU without a deal since he took office. Johnson's money has been earmarked for extra border force officials, port infrastructure, freight capacity and stockpiling medicines.'

**MB:** 'Preparation undertaken by bodies such as Invest Northern Ireland and CBI includes information to assist small and medium businesses based in Northern Ireland and the Republic of Ireland. For instance, an initiative which is being offered by InterTradeIreland is financial support of up to £4,500 for supports and services to assist no-deal preparation in relation to customs and transit procedures. In Northern Ireland, the Department of Agriculture, Environment and Rural Affairs is running information days between 12 September–1 October on importing/exporting food products and labelling and customs implications.'

**MB:** 'The European Registration and Identification (EORI) scheme has been put in place to allow trade with the Republic of Ireland and Europe in the event of a no-deal Brexit.'

**What would change (in legal and practical terms) on day one of a no-deal Brexit in the Republic of Ireland? What will be the priority matters for resolution after that?**

**VP:** 'It is still unclear. When one contrasts the accession scenario with the departure scenario there could not be a greater contrast. When Ireland and the UK acceded to the then European Communities on 1 January 1973 there had been a period of 12 years of on and off accession negotiations, along with very detailed publicity campaigns and guidance on what joining the 'Common Market' would mean. Remarkably with weeks or days to go, there is still no complete set of guidance. When Ireland and the UK acceded (along with the other 20 accession states over time), they had a roadmap ahead of them (in terms of a treaty) and there had been other Member States in place so they could see what was ahead. In contrast, understanding what will change on day one of exit is difficult to predict. This may be understandable, but it is very difficult for businesses and citizens alike.'

**VP:** 'The first moves by the three sides (ie the EU as a whole, Ireland and the UK) would probably be to secure their respective positions. The EU would want to protect the EU's Internal Market, the rights of EU citizens, the financial settlement and the Irish peace process. Ireland's priorities will match those of the EU but will do its best to keep the Irish border open. The UK has stated that it will not introduce border posts.'

**VP:** 'In legal terms, the EU Treaties and EU law would cease to have effect in UK law immediately on exit day if there is no deal. This means that the UK's businesses and citizens would lose EU law rights. It is quite likely that many of the privileges between the UK and Ireland will still continue in practice whether via the CTA or by each of the two countries according rights unilaterally to the citizens of the other country. Ultimately, this question typifies how difficult the issue really is in practice.'

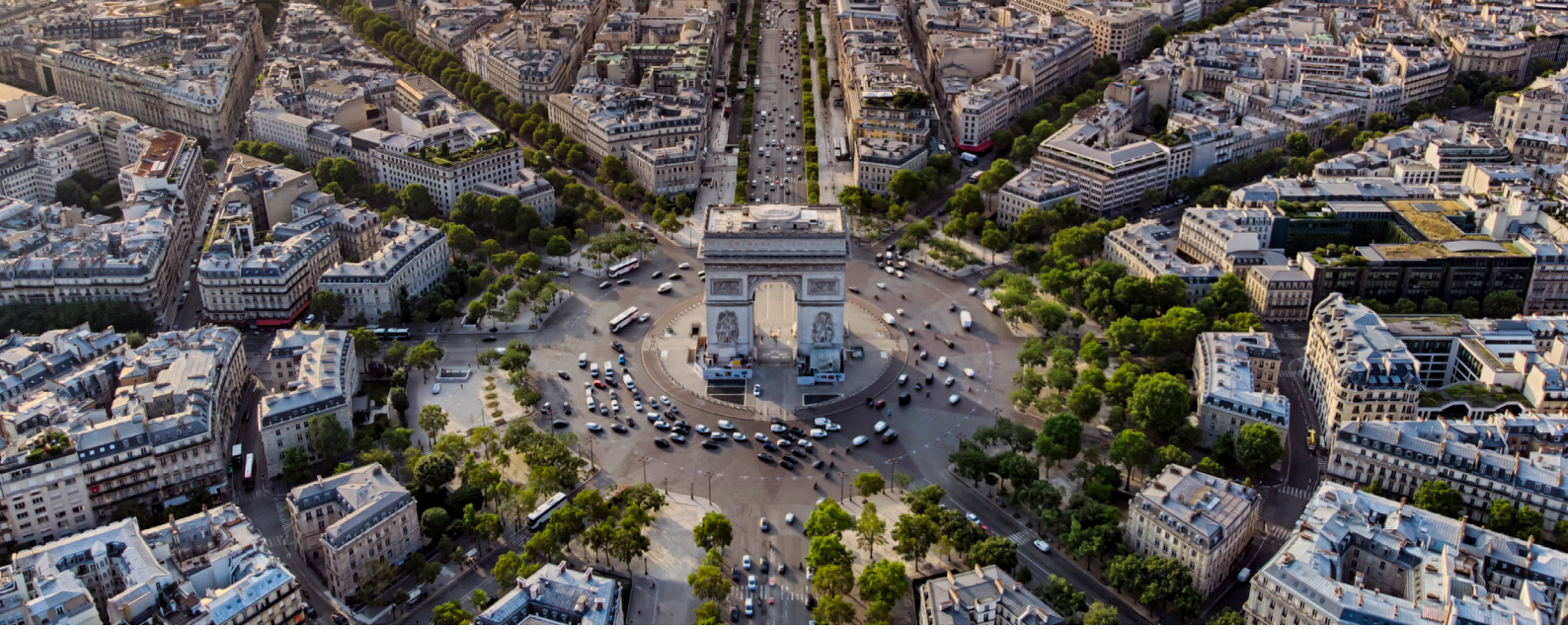
**What would change on day one of a no-deal Brexit in Northern Ireland? What will be the immediate priorities after that?**

**MB:** 'After Brexit, the border between Northern Ireland and the Republic of Ireland will become the only land border between the UK and the EU. Northern Ireland and the Republic of Ireland will instantly be in different customs and regulatory territories. A no-deal Brexit could, almost overnight, put 40,000 jobs at risk in Northern Ireland, according to new analysis from Northern Ireland's Department for the Economy, jobs particularly in industries such as agri-food and haulage. Safeguarding against such job losses is an immediate priority.'

**MB:** 'For trade purposes, on day one of a no-deal Brexit, the UK would become a third country and would revert to the WTO rules when trading with the EU. This is likely to be detrimental to industries such as agri-food due to an average additional fee of 22% when trading with the EU on products such as milk and chocolate. Setting up bilateral trade deals as quickly as possible is a priority.'

**What is the impact for Northern Ireland's devolution settlement if the government uses its freezing powers?**

**MB:** 'In line with the freezing powers set out in section 35 of the European Union (Withdrawal) Act 2018, due to their being no devolved administration, the immediate impact on Northern Ireland's devolution settlement would be minimal. The local political parties do not appear to want to return to Executive government until Brexit has been resolved one way or the other.'



# The view from France

The potential effects of a no-deal Brexit in France are of particular interest due to the cross-channel border. Anthony Charrie, principal in the Oliver Wyman London office, and Hanna Moukanas, partner in the Oliver Wyman Paris office, discuss the view from France and offer essential guidance for practitioners.

**What are the specific priorities for France in preparing for the no-deal Brexit scenario?**

While France would face similar challenges as other countries in a no-deal scenario, three topics are particularly relevant. First, the sheer number of French and British citizens living in the UK and France, estimated at 300,000 and 150,000 respectively, makes the question of residence rights particularly relevant for both countries. Second, ensuring the operational continuity of trade will be important given the volume of trade between both countries, in particular with regards to the £130bn of goods that are transported through the Eurotunnel every year, representing 26% of UK-EU trade. Third, while many large companies have prepared for a no-deal scenario and some are even set to win from such a scenario, small businesses are not all ready to handle the potential additional administrative, operational and financial burden, in particular the 15,000–20,000 that export only within the EU. Companies in certain industries that will need to reshape their business model (eg financial services and aerospace) will also prioritise turning Brexit into an opportunity.

**How does this position differ to a negotiated exit?**

Oliver Wyman estimated, in early 2018, the impact of a no-deal Brexit on French companies at €4bn of direct cost (based on a return to World Trade Organization (WTO) conditions after Brexit). This does not include a wide range of potential indirect costs (exchange rate, pricing, migration etc). While this does not result in a huge impact on France's total GDP, it is larger than in a negotiated exit and would probably have a very differentiated impact depending on the sector and size of the companies. The most impacted sectors will be agri-food (eg cheese, wine and spirits), consumer goods (eg jewellery, perfumes and cosmetics), the automotive and chemical industries and aerospace. While smaller companies will be more directly impacted, it may have a knock-on effect on large corporations' supply chains. Besides increased tariffs (in line with the WTO agreements), the main impact would be operational and administrative.

Since the publication of the Oliver Wyman report over a year ago, the efforts of the French authorities and businesses should mitigate further the impact of a no-deal scenario on the French economy.

**How far have preparations for no deal progressed in France? What legislation, guidance etc has been finalised? What work still needs to be done?**

In an uncertain context, French authorities and businesses have been preparing to minimise the disruption.

The French Parliament passed a law in January 2019 that grants a one-year transitional period for British citizens living in France, where they can enjoy existing rights in case of no deal, with the condition of reciprocity.

To prepare for the potential logistical and operational challenges, President Macron announced a 'Brexit test-run' ahead of exit day. Calais is running a month-long rehearsal as if there was no deal, with online border

declaration system set up and 700 extra staff recruited. France is also spending €50m (£43m) on expanding port infrastructure to reduce border control burdens.

In support of businesses, French government agencies have set up an information portal to provide guidance on how to prepare for Brexit. Some institutions and associations such as Bpifrance and Mouvement des Entreprises de France (MEDEF) have also proposed financial services and technical guidance to help enterprises get ready in the face of Brexit.

French companies have been taking measures to limit the impact and are even seeking new opportunities in Brexit. Companies across sectors, such as pharmaceutical company Sanofi, manufacturer Airbus and French bakery chain Paul, are increasing their stocks ahead of a potential no-deal Brexit. French winemakers are taking out insurance against foreign exchange risk.

**What will happen or change on day one of a no-deal Brexit in France?**

French and British citizens living in the UK and France respectively would be able to remain in the medium term. The UK has guaranteed that EU citizens can remain at least until 31 December 2020, and British citizens living in France will have a one-year transitional period.

The operational preparations at the border should reduce disruption but it does not exclude some of the possible impact, at least in the short term. In a no-deal scenario, UK-France trade would revert to WTO rules, resulting in higher tariffs, higher non-tariff costs (eg declarations and certifications), border controls and restrictions in providing services. While the upgrades in Calais should help reduce the potential delays, it is likely that there will be delays and capacity shortages at the border.

In the longer term, Brexit will create opportunities for certain firms to get ahead of their competition. Firms that will be most prepared for it and will reshape their business and operating model could stand to benefit from it.

**What specific measures will be in place at the border in Calais?**

Besides the reinforcement of staff, a smart border information system will be applicable at all points of entry to/exit from the Calais region to increase border crossing efficiency. This system will allow heavy goods vehicles to complete customs procedures online and automate the border crossing procedures through digital identification. Vehicles that meet transported goods customs declaration requirements will be sent a 'green lane' without having to stop.

**Where can practitioners find out more?**

Oliver Wyman estimated in 2018 the direct costs of Brexit for French companies in Les Entreprises Françaises Face Au Brexit/France's «Red Tape» Costs of Brexit.

Companies can find guidance on Brexit en pratique (French government), Brexit Hub (French-British Chamber of Commerce and Industry) and from the Direction Générale des Entreprises. MEDEF also published a guidance and launched a support service, providing advice to its members regarding Brexit impact on customs, VAT, contracts, etc. French and British citizens will find relevant information on France Diplomatie and Gov.UK.

# No-deal Brexit: international priorities

## Global Britain—trade priorities in the wake of Brexit

### EU trade priorities

Gregory Spak, head of White & Case's international trade group, Sara Nordin, counsel of the global international trade practice, Fabienne Vermeeren, regional director for international trade services in Europe, and Richard Eglin, senior trade policy advisor, examine the EU's trade priorities in light of Brexit and say that the biggest challenges for the EU's trade agenda are the trans-Atlantic trade relationship with the US and forging a new trade agreement with the UK after Brexit.

**What has been the UK's role and influence in EU trade negotiations in recent years and how might Brexit change that?**

The UK has been an important and pragmatic EU Member State, and for decades, it has played a significant role in EU trade negotiations. For example, the UK helped drive the EU's trade negotiations with key countries such as Canada, Japan and Singapore. The UK has played a determinative role in EU trade policy in relation to services, especially financial services, because of the role of the City of London as a leading financial service centre. At the same time, the UK has helped to ensure important overall EU balance on other trade topics. However, since the official UK withdrawal process from the EU began, other EU Member States and the EU institutions have understandably been hesitant to involve the UK in discussions about the EU's long-term trade strategy and the UK's influence has inevitably waned.

**Which countries is the EU seeking to make trade deals with at the moment? Will these deals still apply to the UK once it has withdrawn from the EU?**

The EU is currently seeking trade deals with many countries, and they are at various stages of negotiation. Since the UK referendum on withdrawal from the EU in 2016, new or updated EU trade agreements have been concluded with Canada, Japan, Mercosur, Mexico, Singapore, South Africa, South Korea and Vietnam, and trade negotiations have been launched with Australia, Indonesia and New Zealand. These agreements were concluded by the EU Member States collectively, not individually, so they will cease to apply to the UK once it has withdrawn from the EU. The single biggest question mark on the EU's free trade agreement (FTA) agenda is of course the EU's relationship with the US. Negotiations on the Trans-Atlantic Trade and Investment Partnership (TTIP) were halted at the end of the administration of President Obama. As EU trade commissioner Cecilia Malmström has said TTIP is 'in the freezer' and it remains uncertain if and when it can be 'defrosted'. President Trump and EU Commission President Juncker agreed in mid-2018 to launch new trade negotiations but these have made no substantive progress since then because of continuing disagreements about their scope, in particular the EU's insistence on the exclusion of agriculture. In the meantime, the focus of trans-Atlantic trade relations has been concentrated on the US' introduction of Section 232 tariffs on imports of steel and aluminium from the EU (and elsewhere) and its threat to extend those tariffs to also cover automobiles, and the countermeasures taken by the EU to retaliate against what it considers to be unlawful US restrictions.

**Are there any EU trade priorities in which the UK has a particular interest?**

The overall priorities of the EU's trade strategy, including enhanced trade liberalisation through FTAs, are largely in line with the trade priorities of the UK government. Ensuring global market access for domestic industries is consistent with the UK's trade objectives in a wide range of sectors.

Of course, the UK's interest in EU trade priorities could begin to take on a different character as 31 October 2019 approaches. Whether we want to admit it or not, trade relations have a significant competitive element, especially if we believe that the world is moving away from multilateral negotiations and agreements based on the most-favoured-nation (MFN) principle to a system of bilateral, regional, or otherwise preferential trade negotiations and agreements. In the latter system, the UK and the EU will be competitors, and it would be natural to expect that the UK and the EU will begin, through trade policy, to compete for market access and investment flows. This will be a different reality for the UK and the EU Member States.

**Are there any current or potential trade partners on the EU's list which the UK is likely to target for an early deal post-Brexit?**

The UK has indicated that it will be seeking trade agreements 'with old friends and new partners' after Brexit. As long as it remains an EU Member State, the UK's ability to enter trade talks is limited, as trade negotiations are reserved for the European Commission. The UK has pursued actively negotiations with countries with which it is already in an FTA (by virtue of EU membership) with the aim of 'rolling over' the benefits of those agreements as a contingency in the case of a no-deal Brexit. To date it has succeeded in securing continuity agreements with Norway, South Korea, Switzerland and a handful of others. Discussions are continuing with, most importantly, Canada, Mexico, the Southern African Customs Union and Turkey. If the UK and the EU can conclude a Withdrawal Agreement before 31 October 2019, all of the EU's FTAs will continue to apply to the UK during a transitional period which is currently set to end in December 2020 and may be extended to up to two years. In addition, the UK has begun exploring new bilateral trade agreements with Australia, the US, China, India, Singapore, and New Zealand. New FTAs with these countries cannot enter into force until the UK has formally withdrawn from the EU in a no-deal scenario or until the end of the transition period if a withdrawal agreement is reached, but negotiations can start straightaway. Some countries may look to negotiate improved terms with the UK once it becomes an independent trading state.

**Is it realistic that the UK could secure comparable deals with current EU trade partners post-Brexit? What are the key challenges in this approach?**

The smaller size of the UK economy, compared to the EU as a whole, will inevitably mean reduced bargaining leverage for the UK in any FTA negotiations. Moreover, the interests of the UK's trading partners may be different in relation to the UK market compared to the wider EU. Therefore, the UK agreements may in some cases be different in structure and nature than the current EU deals. A key challenge for the UK will be having the expertise and resources needed to pursue an ambitious trade agenda after 40 years in which trade negotiations have been handled by the EU Commission in Brussels rather than by UK officials in London.

**If Brexit leads to divergence between the UK and EU regulatory regime, what impact could this have on UK trade opportunities?**

This will be a key area for policy decisions by the UK government. It has stated that it is aiming for frictionless trade with the EU after Brexit. In principle, that will require continued, very close alignment with EU regulations and standards to ensure unfettered access to the Single Market, particularly for agricultural and manufactured goods. At a minimum, UK companies will still need to comply with EU rules when exporting their products to the EU market. At the same time, some of the countries with which the UK is hoping to strike new trade deals after Brexit will be pressing the UK to move away from the EU regulatory model. That is the case in particular of the US, which has viewed certain aspects of EU regulation, such as the use of the precautionary principle, as creating a non-tariff barrier to trade. The US has instead urged the UK to adopt a science-based approach to risk assessment when establishing its own national regulations and standards. This issue will need to be resolved by the UK government in the course of its trade negotiations with the EU and the US.

## UK trade priorities

Richard Eccles, partner at Bird & Bird, discusses the main trade objectives for the UK government in the event of a no-deal Brexit.

**What are the main objectives for the Department for International Trade in relation to the trade strategy in the event of a no-deal Brexit?**

The Department for International Trade's (DIT) main current objectives will include seeking the agreement of countries with which the EU already has a trade agreement, to continue those terms bilaterally with the UK when it leaves the EU. The UK is reported to have agreed such terms in 15 cases covering only 38 countries or territories so far, out of a total of over 70 countries with which the EU has a free trade agreement.

In addition, the DIT will be looking to establish the Trade Remedies Authority, which will be the new UK authority dealing with disputes and remedies under the WTO Agreement once it is established when the Trade Bill becomes law. The Authority will be brought into operation following Brexit.

**How can the UK prepare their post-Brexit trade strategy? Have they entered into any negotiations?**

The UK is not able to negotiate new trading terms with other countries for as long as it is a member of the EU, and therefore of the EU customs union. Such negotiating powers are reserved to the Commission, including for countries with which the EU does not already have a free trade agreement. Before leaving the EU, the UK government can do no more than discuss high level intentions. Following Brexit, it will be able to negotiate free trade agreements not only with countries that currently have such agreements with the EU, but also those that do not, such as the USA.

One of the issues may be that some of the countries with which the EU has a trade deal will be looking to obtain improved terms with the UK as an individual party, as compared with those that it has through the EU. It cannot be assumed that all of these countries will roll over the terms that they have with the EU to the UK as an independent party. There is also the potential difficulty for the UK, as regards countries that do and those that do not currently have an EU trade agreement, that despite the UK's importance in economic terms, it is less extensive in its own right than the EU.

# Brexit and treaties—what will happen to the EU's international agreements when the UK leaves the EU?

Mainstream interest in the UK's departure from the EU, the prospect of doing so without a deal in place, has prompted considerable debate of the treaties that govern the UK's current and future international relationships. Laura Rees-Evans, senior associate at Fietta, assesses the key treaties and contingency arrangements, both in place and in the pipeline, separating the known from the unknown quantities as she goes.

**What is the status and impact of the UK's preparations for Brexit as regards international treaties and arrangements in which it participates by virtue of its membership of the EU?**

The UK's membership of the EU regulates not only its relationship with the other 27 EU Member States (EU27), it also governs aspects of the UK's relationship with countries outside of the EU (third countries). That is because the UK is a party to, or enjoys the benefits of, over 1,000 international agreements with third countries and international organisations by virtue of its membership of the EU. They cover a range of subject matters, including air services, fisheries, insurance, nuclear cooperation, political association, mutual recognition, trade and land transport. The draft Withdrawal Agreement negotiated between the UK and EU makes arrangements for both the relationship between the UK and the EU27 as the UK leaves the EU and the continuation of international agreements with third countries and international organisations during the 'transition or implementation period'.

To prepare for a no-deal Brexit scenario (or for the end of a transition period, in the event the UK leaves the EU with a deal), the UK government has been working 'to identify which international agreements need to be retained on exit, and to put in place arrangements with international partners to replicate the effects of the current agreements', as stated in the Department for Exiting the EU (DExEU) guidance. The government publishes details of the status of its programme of replication online. This is a significant programme of work, particularly as negotiations of new bilateral treaties and treaty actions relating to existing multilateral treaties have had to take into account the possibility both of the UK and EU striking a deal and of the UK leaving without one. The government has made substantial progress, though negotiations are ongoing in relation to some important agreements.

**What happens in real terms if this preparation is not completed in time? For example, what will be the impact on supply chains, citizens' rights etc?**

If the UK leaves the EU with a deal, the draft Withdrawal Agreement provides that the UK will continue to be covered by the existing EU international agreements. Accordingly, the body of work that has already been completed would largely become relevant only at the end of the transition period.

Real impacts would be felt if the UK leaves the EU without a deal. If none of this work had been carried out, those impacts would have been enormous. Preparations have been put in place in a number of areas, in order to ensure a smooth transition out of the EU in the event of a no-deal Brexit, for example:

- there continues to be a legal basis for flights to continue to operate between the UK and Canada and the UK and the US
- UK coach operators can continue to run occasional services into any EU Member State, plus seven further states, 'in much the same way as they do now' (DExEU guidance)
- the rights of 40,000 UK nationals living in Switzerland, and 14,000 Swiss nationals living in the UK, are protected
- UK consumers continue to benefit from trade in wine with Australia

- various specific UK geographical indications continue to enjoy the protections they currently enjoy around the world, such as an agreement with the US on recognition of certain distilled spirits

The corollary of these success stories is that there will also be impacts if and where successor agreements will not be in place in time for a no-deal Brexit on 31 October 2019. For instance, while much progress has been made on contingency trade agreements (successor trade agreements will be in place with Israel, Iceland, Norway, and Switzerland, among others, accounting for '64% of trade currently covered by EU agreements for which the UK is seeking continuity' (Department for International Trade guidance)), there are a number of important agreements that are said to be subject to 'ongoing engagement' and therefore may not be in place in time for a no-deal Brexit on 31 October 2019, or that admittedly 'will not be in place' (trade agreements with Canada and Japan, respectively, being good examples). This means that, in relation to Japan, for instance, there will be no agreement allowing for preferential trading between the UK and Japan in the event that the UK leaves the EU without a deal on 31 October 2019.

**How does this impact UK practitioners and what can they do to prepare?**

UK practitioners will be impacted differently depending on their area of legal practice. Some will see relatively little impact, whereas others will be greatly impacted (competition and intellectual property practitioners are good examples) and there will be a new demand for international trade lawyers.

UK practitioners can continue to monitor the government's progress in delivering successor agreements relevant to sectors in which they advise via the UK government website. Practitioners may be well advised to supplement their own advice to clients with that of public international law specialists, where, for example, questions arise relating to the status of the EU's international agreements vis-à-vis the UK post-Brexit or the status of intra-EU agreements.

**What is the likelihood of legal challenges?**

Given the significant level of uncertainty generated by Brexit, the risk of disputes arising is high. On account of the breadth of potential issues, and the ongoing lack of clarity over the way in which the UK will leave the EU, it is difficult to outline any specifics at this stage.

**What are the priorities behind the scenes and how do you see these being actioned/progressed?**

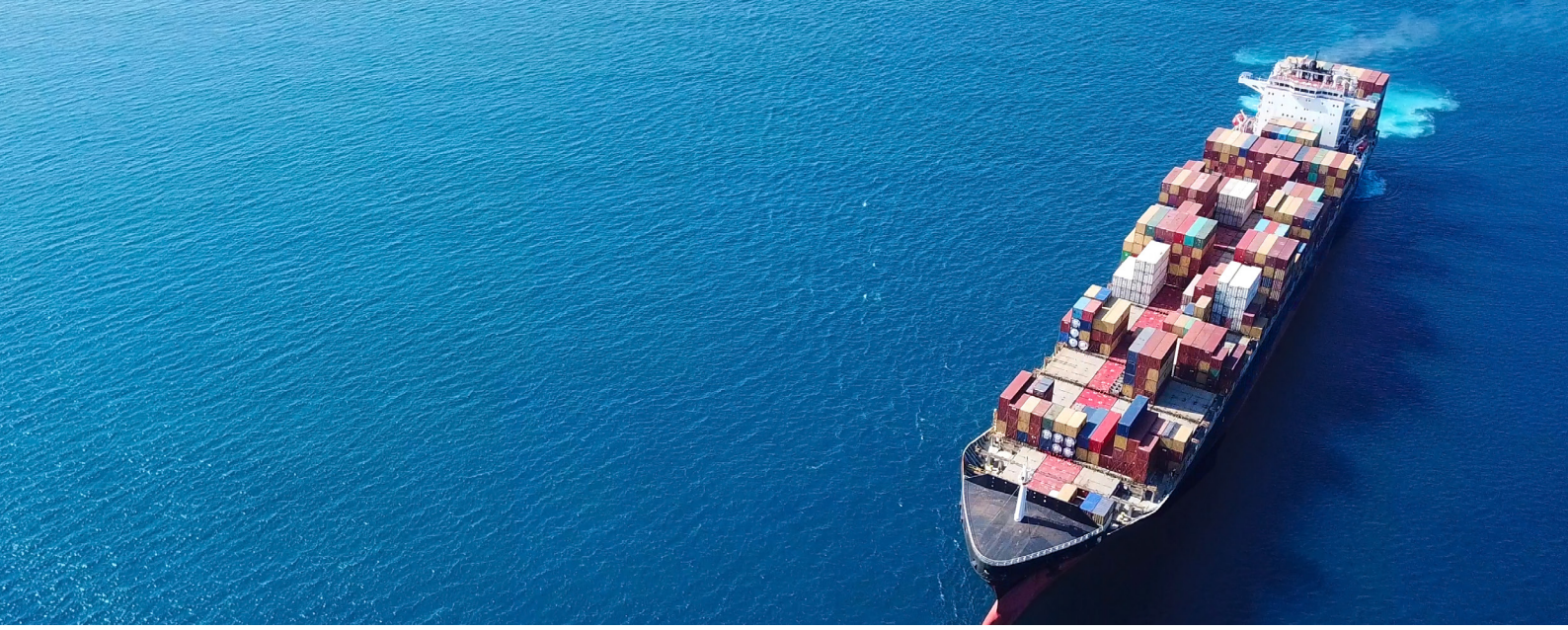
Brexit has generated an unprecedented level of interest in international treaties, both from Parliament and the public (perhaps reaching a peak in March 2019 when discussion of the possible invocation of Article 62 of the Vienna Convention of the Law of Treaties hit mainstream news media). This new interest has, among other things, led to a reassessment of Parliament's powers to scrutinise treaties (the framework for which is set out in the Constitutional Reform and Governance Act 2010) and how it organises itself to make use of those powers.

The House of Lords Constitution Committee published a report on 30 April 2019, concluding that Parliament's current mechanisms to scrutinise treaties were limited and flawed, and that reform was required. It proposed the creation of a dedicated parliamentary treaty committee to provide effective scrutiny. Since January 2019, the House of Lords EU Select Committee has been scrutinising new Brexit-related treaties. It remains to be seen how these proposed and current structures will develop. However, it is clear that there is and will remain a strong appetite in Parliament to play a more significant role in the UK's treaty-making processes, and that this could have long-term implications for the UK's ability to negotiate and conclude treaties.

**What else should we be keeping an eye on?**

The next few weeks and months will reveal whether the UK is to leave the EU with a deal, and if it is, what that deal looks like. The deal currently on the table (the draft Withdrawal Agreement) provides for an implementation period during which the UK shall continue to 'be bound by the obligations stemming from the international agreements concluded by the Union, by Member States acting on its behalf, or by the Union and its Member States acting jointly' (Article 129(1)). Practitioners may wish to keep an eye on this provision, and whether it (or an amended version of it) is ultimately included within any final deal the UK may reach with the EU. If it is not, the UK will immediately upon leaving the EU lose the benefit of any international agreement it currently enjoys through its membership of the EU (unless it has been replicated in a successor agreement or, in the case of certain multilateral agreements, the UK has acceded as in its own right).

Another major issue to watch over the next few months is the government's articulation of its post-Brexit policy on international investment agreements in general and, in particular, the fate of the twelve bilateral investment treaties between the UK and other Member States (intra-EU BITs). In January 2019, the UK (alongside all other Member States) committed to terminate all intra-EU BITs by 6 December 2019, by ratifying, approving or accepting a plurilateral or bilateral treaty. The timing of the UK's withdrawal from the EU, and the means by which it does so (with or without a deal), may therefore have a significant impact on the continuation of the UK's existing intra-EU BITs. In this respect, a no-deal Brexit on 31 October 2019 could leave investors in a better position than leaving with a deal or remaining in the EU, because it will allow the UK to preserve those existing intra-EU BITs.



# WTO—an introduction

One of the biggest issues in a no-deal Brexit scenario would be that of trade. However, this field can be very hard to navigate with a complex web of interactions between the UK, EU and World Trade Organization (WTO). Anthony Parry, senior consultant, and Tone Oeyen, partner, at Freshfields Bruckhaus Deringer, cut through the noise and provide essential information surrounding the WTO and a no-deal Brexit. This includes trade agreements, ascension and the Northern Ireland border issue.

**What are the key features of the WTO rules and how do they operate?**

The WTO provides a common framework for international trade in goods and services. The Marrakesh Agreement, establishing the WTO (WTO Agreement), provides the basic rules on membership, structure and decision-making for the WTO's 164 member countries. The four other main agreements cover trade in goods (GATT), trade in services (GATS), intellectual property rights (TRIPS) and dispute settlement (DSU). All WTO members are required to participate in these agreements, as part of the so-called 'single undertaking'. In addition, there are several so-called 'plurilateral agreements', associated with the WTO and which WTO members can participate in if they want to. Most notable of these is the Government Procurement Agreement.

The UK is a member of the WTO in its own right. Brexit will not change that, but the UK is establishing membership terms separate from the EU's, including the adoption of its own tariff and services schedules.

*Trade in goods—GATT*

The General Agreement on Tariffs and Trade (GATT) is the WTO's umbrella agreement intended to liberalise trade in goods by reducing barriers through the application of two underlying non-discrimination principles which underlie all the WTO agreements:

- national treatment—WTO members must treat foreign goods in the same way as domestic ones
- most favoured nation (MFN) treatment—WTO members must not discriminate between members, so any concessions granted to one WTO member must, in principle, be granted to all other members

These principles generally prohibit quotas, import and export licences and other trade restrictions at borders. However, WTO members may:

- apply limited import tariffs as set out in each WTO member's agreed and binding tariff schedules
- adopt specific protective measures against unfair trade practices in order to safeguard domestic industries (eg anti-dumping measures to counteract unfair pricing of imports below prices charged in the home market)
- apply certain exceptions to pursue legitimate public interest objectives, such as the protection of human, animal or plant life or health
- accord more favourable treatment to other countries with whom they are in a customs union (CU) or have concluded a free trade agreement (FTA). The EU is an example of such a CU. The EU also has FTAs with over 50 countries including Iceland, Israel, Mexico, Norway, South Korea, Switzerland and Turkey. CUs and FTAs may put in place uniform tariffs towards countries outside the CU or FTA

*Trade in services—GATS*

The General Agreement on Trade in Services (GATS) aims to liberalise trade in services via a general framework of mandatory general obligations and national schedules of specific commitments. As a consequence of a no-deal Brexit mutual recognition of regulatory regimes with the EU will cease and UK service providers will not be treated like local businesses in the Member State where they offer their services. Instead, they will be treated like any other third country provider in the Member State concerned.

There is no general obligation to grant market access for services from providers based in other WTO members. Instead, specific commitments on market access for services are included in schedules annexed to the GATS and form an integral part of that agreement. But if a commitment is offered on a particular category of services, it must be offered to all WTO members, on an MFN basis. Unlike trade in goods, national treatment in the GATS is negotiable, thus allowing flexibility to WTO members to tailor their commitments on services.

The national schedules identify the services and service activities for which market access is guaranteed and set out the conditions governing this access. Scheduling can apply across all sectors or only to specific sectors or specific activities. For example, WTO members might allow market access for legal services except legal document drafting. Specific commitments can also be scheduled only for certain modes of supply. For example, WTO members might grant market access for cross-border supply (eg a bank providing financial advice into the host country from another member country by telephone) but restrict market access for commercial presence (eg the bank would not be permitted to establish a branch within the host country).

Governments can also grant full national treatment, impose limitations and qualifications on national treatment and discriminate in favour of nationals, or not grant national treatment at all. GATS is therefore severely limited compared to the current EU regime. For example, it does not guarantee a right of establishment for firms or branches, the freedom to provide cross-border services or the automatic mutual recognition of professional qualifications.

Once agreed, commitments conferring a benefit can only be modified or withdrawn following negotiation of compensation with the country concerned.

WTO members can schedule exceptions to MFN treatment for specific existing measures, for public procurement, or in favour of adjacent countries or members who are parties to FTAs, CUs or integrated labour markets.

*Intellectual property rights under the Agreement on Trade-Related Aspects of Intellectual Property Rights*

The Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS) establishes minimum protection levels for the intellectual property rights of other WTO members' nationals. Brexit should have minimal impact, as the level of protection of intellectual property rights in both the EU and the UK exceeds the requirements set by TRIPS.

*Government Procurement Agreement*

The Government Procurement Agreement (GPA) is a plurilateral agreement within the WTO framework. There are presently 20 parties comprising 48 WTO members and another 34 WTO members/observers. The aim of the GPA is to open government procurement markets on a mutual basis. The GPA requires open, fair and transparent conditions of competition in government procurement. However, these rules apply only to procurement activities scheduled by each member by covered entities purchasing listed goods, services or construction services above a certain value.

*Trade defence instruments*

While the WTO trading regime is based on (limited) binding tariffs and quota which are—in principle—equally applied to all trading partners, the WTO agreements also allow for exceptions to protect domestic industries against unfair trade practices. Specific multilateral agreements, which are annexed to the GATT, provide a framework for WTO members' rules in relation to actions taken against dumping (where products are sold for export at less than their domestic price), subsidies (where products are manufactured with the support of unjustified government funding) and sudden increases in imports (safeguard measures).

As a member of the EU, the UK has no independent trade remedy system. In anticipation of Brexit, the UK has proposed legislation which mirrors the WTO's rules governing anti-dumping, anti-subsidy and safeguard proceedings. A Trade Remedies Investigations Directorate (TRID) has been established in the Department for International Trade and will be responsible for administering the trade remedies functions, until an independent body (the Trade Remedies Authority) has been set up.

The EU currently has around 90 anti-dumping and anti-subsidy measures in place on goods imported from third countries. Unless the UK remains a member of the EU customs union post-Brexit or transition measures apply, these EU measures will cease to apply to products imported into UK. On the basis of a public consultation,

a list was drawn up of the existing EU measures which are of importance to the UK industry and which the TRID intends to maintain post-Brexit. All of these transitioned measures will be maintained at the same level set previously by the European Commission, until the Trade Remedies Authority completes a full review based on UK-specific market data.

**How far along the process of confirming its post-Brexit WTO status, schedules and agreements is the UK? Is this likely to be completed by 31 October 2019?**

The UK is currently negotiating its schedules with other WTO Members, but if it is unable to complete the WTO certification process before Brexit, it may need to establish its new schedules unilaterally on a provisional basis. A WTO panel (EU–Poultry Meat (China)) has held that so far as concerning goods, certification is a procedural requirement and doesn't give other WTO members a veto, although the UK would need to reach agreement on certification eventually.

The UK public procurement regime will remain largely unchanged at the domestic level. The UK has applied to accede to the GPA to become a party in its own right. This is subject to the rights and obligations it currently has as an EU Member State on the basis of the commitments which are currently contained in the EU's schedule and it has made a formal market access offer which the other parties have approved. The UK's accession will take place 30 days after Brexit.

The UK government has published four papers on intellectual property (IP) issues. It plans to provide equivalent UK registrations for EU trade mark and Community Design registrations which exist on Brexit. Regarding copyright, the UK's membership of the Berne Convention, Universal Copyright Convention etc, are not affected by Brexit and copyright will remain largely unchanged. Regarding patents, the relevant EU legislation (or its domestic implementation) will be retained in UK law under the European Union (Withdrawal) Act 2018 and existing systems will remain in place, operating independently from the EU regime. The UK will explore whether it would be possible to remain within the Unified Patent Court and unitary patent systems in a no-deal scenario. Regarding exhaustion of intellectual property rights, the UK will continue to recognise the EEA regional exhaustion regime from exit day to provide continuity in the immediate term for businesses and consumers.

*UK trade agreements with non-EU countries in a no-deal Brexit*

The UK participates in a network of EU trade agreements with third countries, together comprising some 70 trading partners. The UK originally envisaged that it would simply be able to 'roll over' all of these agreements on a bilateral basis. However, this process has proved more difficult than originally anticipated and at 1 September 2019 only 13 so-called trade continuity agreements had been signed, covering 38 countries.

Trade between the UK and the third countries which have a trade agreement with the EU, but which do not have a trade continuity agreement in place with the UK on Brexit day, will fall back on WTO terms in the event of a no-deal Brexit. For example, trade in goods between the UK and those third countries will be subject to the UK's binding WTO tariff schedules and will no longer benefit from the reduced or zero tariffs which may apply pursuant to the trade agreement with the EU.

**If not, what will happen in the period between exiting the EU and completing the accession to the WTO?**

The UK is of course already a WTO member, so it doesn't need to re-accede to the WTO or to the WTO agreements which form the 'single undertaking', ie GATT, GATS, TRIPS and DSU. However, it does need to accede to GPA since it previously participated in the GPA only through the EU. This process for GPA is well advanced. As indicated above, although the UK may not compete the process of certification of its GATT and GATS schedules in time, it will be able to apply its proposed schedules provisionally.

**If the UK adopts trading on WTO terms on a 'provisional' basis, could other members bring enforcement proceedings? Are there any examples of countries having operated on this provisional basis recently?**

As mentioned above, the UK is currently negotiating its schedules with other WTO members. If it is unable to complete the process before Brexit, it may need to establish its new schedules unilaterally on a provisional basis. In theory there is a risk of challenge to these unilateral schedules. EU Agriculture Commissioner Phil Hogan even went so far as to say the UK proposals for provisional schedules were 'illegal'. However, the 2017 WTO Panel Report, EU–Poultry Meat (China), suggests the UK may indeed be able to adopt trading on WTO terms on a 'provisional' basis, at least so far as concerns trade in goods. In the poultry meat case the EU modified its tariff commitments for certain poultry products and replaced them with tariff-rate quotas (TRQs), without first taking China's interests into account. The panel rejected China's claim that the changes in the EU's schedule had no legal effect because they had not been certified by the WTO, but it also suggested special factors would have to be taken into account in the individual case. Brexit would clearly present an uncertainty factor here and with Brexit being unprecedented it is difficult to predict with any certainty how a WTO panel would look at a specific challenge.

It is also worth pointing out that there is currently significant uncertainty around the effectiveness of the WTO Dispute Settlement Understanding, (DSU) which governs the procedure to settle legal disputes between WTO members, due to the paralysis over renewing the membership of the Appellate Body. The EU and Canada have announced an interim bilateral arbitration solution for the WTO Appellate Body deadlock but there is of course no such agreement in place with the UK.

**How do the WTO rules factor into the Northern Ireland border issue?**

A major obstacle to finalising a Withdrawal Agreement between the EU and the UK has been the need to find arrangements which would respect the Good Friday Agreement and avoid the re-imposition of a hard border between Ireland and Northern Ireland. The controversial backstop mechanism foreseen in the so called Northern Ireland Protocol attached to the draft Withdrawal Agreement endorsed by the EU27 and the UK government of former Prime Minister Theresa May, was designed to avoid physical product checks at the border, by keeping the UK in the EU customs union until an alternative arrangement could be found to deal with the Irish border issue. The backstop would avoid border checks in Ireland and avoid trade between the UK and EU defaulting to WTO rules with non-preferential tariffs.

**What guidance is available?**

Please see below for a non-exhaustive list of useful materials.

- General information on the WTO
- UK goods and services schedules at the WTO
- MFN and tariff rate quotas of customs duty on imports if the UK leaves the EU with no deal
- Guidance on customs matters in case of no deal and here
- Bidding for overseas contracts: what to expect if there's a no-deal Brexit
- Guidance: IP and Brexit
- UK trade agreements with non-EU countries in a no-deal Brexit
- Exporting to Ireland after Brexit if there's no deal
- For Peter Ungphakorn's always interesting and informative commentaries see here
- Lorand Bartels: The UK's Status in the WTO after Brexit

# WTO—trading goods and services

James Lindop, partner, and Monika Zejden-Erdmann, senior associate, both at Eversheds Sutherland, discuss the transition the UK faces in trading goods and services on WTO terms, in the event of a no-deal Brexit.

**What is the status of the UK's draft WTO schedules of commitments for goods and services? What happens on day one of a no-deal Brexit scenario if these arrangements are not finalised?**

The consequence of a no-deal Brexit would be that the UK would trade with the EU under WTO rules. Once the UK is no longer part of the EU's customs union, it will have to meet two conditions of WTO membership. It has already met the first condition, which is to ratify the WTO Agreement. The second condition is that the UK must have its own most-favoured-nation (MFN) schedules of market access commitments for goods and services.

In July 2018, the UK government submitted its draft schedule setting out its WTO market access commitments for goods once the UK leaves the EU, the proposal has drawn official objection from a number of jurisdictions, which means the WTO cannot certify the draft schedule until the problem is resolved. This will force the UK to undergo a full procedure for modifying its rates rather than the simplified rectification procedure it had hoped for.

In December 2018, the UK government submitted its draft schedules for WTO market access commitments in relation to services once the UK leaves the EU. After receiving objections, the schedule for services has been referred to the WTO for negotiation and the UK will have to undertake the same full rectification procedure as it needs to for goods.

Certification of the schedules is the process of attesting changes and ensures that the schedules are up to date. If the UK fails to reach an agreement on its draft schedules before it leaves the EU, it can operate on uncertified schedules.

Continuing to trade on uncertified schedules carries an inherent degree of uncertainty, and another WTO member could issue a dispute against the UK.

**What will be the main changes in relation to the sale of goods if the UK starts trading on WTO terms? How will this impact supply chains? What are some practical examples of this?**

In the event of a no-deal Brexit, a hard border will be imposed between the UK and the EU and, therefore, UK companies that previously traded freely within the EU will face new costs within their supply chain each time their goods cross the border, including those relating to import tariffs and customs formalities.

On 13 March 2019, the government published details of the UK's temporary tariff regime for a no-deal Brexit. Under this regime, the UK is intending to offer tariff free access to its market for the vast majority of goods—87% of all imports to the UK by value. The remaining 13% would be subject to tariffs and, where relevant, tariff quotas. On the MFN principle, these tariffs would apply to imports from all WTO members (unless there is a free trade agreement (FTA) in place—to date, the UK has

rolled-over 13 FTAs that will take effect upon Brexit). The temporary tariff regime is designed to minimise the cost of Brexit as the vast majority of imports will not be subject to tariffs (although they will be subject to customs formalities, which is likely to impact on-time delivery). The regime would apply for up to 12 months, while a full consultation and review on a permanent approach to tariffs is undertaken.

A similar regime for imports into the EU has not been proposed by the EU authorities, which means that goods imported from the UK to the EU post-Brexit will be subject to tariffs under the rates set out in the EU's WTO schedule.

It has been suggested that traders could face the potential impact of £5.2bn in tariffs on goods being sold from the UK to the EU. One of the biggest impacts is expected to be on exports of vehicles and components, with tariffs in the region of £1.3bn being applied to UK car-related exports to the EU. This compares to £3.9bn for EU exports to the UK, including £1.8bn in tariffs which could apply to German car-related exports. Notably, the UK government's proposed temporary tariff regime does not exempt cars from import duties (most motor vehicles would attract 10% import duties).

**How will the provision of services be affected?**

The UK services industry constitutes an estimated 80% of the country's economy. Currently, the UK exports more services to the EU than the EU exports to it. Unlike trade in goods, services are not restricted by tariff barriers and border checks. However, national legislation and regulation on, for example, licencing, quotas, professional qualifications and immigration, decide when and how foreign providers can enter a market.

In the event of a no-deal Brexit, WTO rules offer limited freedom to provide services cross-border. In February 2019, the UK government recognised that the UK would risk a loss of market access and increase in non-tariff barriers when it comes to exporting services to the EU. UK businesses would face barriers to establishment and restriction in relation to the different modes of service provisions in the EU which they had not previously faced, including:

- nationality requirements
- mobility
- recognition of qualifications
- regulatory barriers when setting up subsidiaries in EU Member States

The biggest change for the provision of services post-Brexit is that the mutual recognition of regulatory regimes will end. As such, UK service providers would no longer be treated as if they were local businesses in EU Member States where they offer their services. This will lead to increased complexity for businesses currently operating cross-border. The consequence of this may be that, for example, some UK professionals working in the EU would no longer be recognised as having valid professional qualifications.

**What is the UK's status in the WTO General Procurement Agreement (GPA) and what happens in practice if UK accession is not finalised before exit day?**

In the event of a no-deal Brexit, becoming a third country to the EU could mean that UK businesses would lose rights of access to public procurement markets in the EU. This means that EU Member States would not have to apply the same rules to a potential UK supplier as they do to EU businesses.

The GPA is an agreement within the framework of the WTO, the fundamental aim of which is to mutually open government procurement markets among its parties. The GPA establishes rules that require open, fair and transparent conditions of competition in government procurement procedures.

On 27 February 2019, the WTO members approved the UK's application for membership to the GPA in its own right. That means that the UK would be able to have (albeit more limited) access to the EU's public procurement procedures post-Brexit.

The GPA Committee's decision on the UK's accession refers to two scenarios:

- where the UK and the EU reach an agreement on the terms of the UK's withdrawal
- where the UK leaves the EU with no deal

In the first scenario, the GPA Committee would need to reach a further decision to allow for the UK accession at the end of the deal implementation period. During the implementation period, the GPA would continue to apply to the UK as if it were a Member State of the EU. If the UK leaves the EU without a deal, the UK will ratify the GPA as soon as possible once the process set out in section 20 of the Constitutional Reform and Governance Act 2010 is completed. This should ensure that the UK's membership to the WTO will seamlessly continue.

**What is the impact on ongoing and new public procurement exercises?**

In the event of a no-deal Brexit, EU rules on public procurement will crystallise in UK domestic law. This means that a lot of the UK public procurement rules will remain largely unchanged.

However, there will be some practical differences, for example, UK contracting authorities may no longer have access to the Official Journal of the EU dedicated to EU

public procurement, Tenders Electronic Daily. Instead, they will be obliged to publish public procurement notices to a new UK e-notification service (called Find a Tender), which will be active from 11pm on 31 October in the event of a no-deal Brexit. Contracting authorities which are currently working with a third-party provider to submit notices to Tenders Electronic Daily should be able to continue to do so, provided that the service provider has completed the integration work to post notices to Find a Tender.

For public procurements that would have commenced before Brexit (ie those already posted on Tenders Electronic Daily), UK contracting authorities will need to comply with the new public procurement regulations post-Brexit ie by posting subsequent award notifications to Find a Tender.

Additionally, as mentioned above, the UK will become a third country under EU procurement rules, restricting UK contractors' ability to bid for public contracts in EU Member States. However, once the UK's accession process to the GPA is finalised, UK operators will have access to EU procurement markets on a non-discriminatory basis (albeit subject to more limitations).

**How are WTO rules enforced and breaches challenged?**

The WTO has its own judicial system for resolving disputes between Member States, comprised of two stages—firstly the WTO Panel and secondly the Appellate Body. The purpose of the WTO dispute settlement system is to provide security and stability to the multilateral trading system. In principle, where non-compliance with the WTO Agreement has been alleged by a WTO member, the dispute settlement system is available to provide a resolution of the matter as between the members.

Only WTO members are able to bring complaints to the WTO Panel. Therefore, any company or individual that would like to challenge the practices of a WTO member would need to persuade its government to bring a claim to the WTO Panel on its behalf.

As a first step, parties enter into formal consultations in an attempt to settle the dispute. If that is not possible, the complainant member can refer the dispute to the WTO Panel which will review the merits of the complaint and issue a decision normally within a year.

The respondent member may appeal a decision to the Appellate Body. Unlike the Panel (which is normally composed of three, or sometimes five experts), the Appellate Body (fully constituted) is a permanent body of seven members tasked with reviewing the legal aspects of the reports issued by Panels. The Appellant Body may uphold, reverse or modify the Panel's findings.

There is no obligation on a WTO member to implement the recommendations of the WTO panel. In some cases, where there is a dispute over implementation, separate proceedings may be referred back to the initial panel. In cases of non-implementation, the parties may enter negotiations for compensation to be paid pending full implementation of the recommendations. However, if no agreement can be reached, the complainant member may be authorised to impose retaliatory measures. These usually take the form of increased tariffs being imposed on imports of goods from the breaching member.

The WTO dispute resolution system offers limited remedies—for example, there are no provisions for monetary compensation or fines. WTO remedies are generally future-facing and any damages suffered by a complaining member (or, indeed, the businesses operating within that member) usually remain uncompensated.

# WTO—government procurement

In September 2019 the UK government published updated guidance on public procurement processes in the event of a no-deal Brexit. David Hansom, partner at Clyde & Co LLP, discusses the practical implications of this guidance, taking into account the ongoing negotiations between the UK, the EU and the World Trade Organization (WTO).

**What impact does Brexit have on the key EU derived domestic regulations implementing the public procurement rules in the UK?**

Public procurement regulation in the UK is devolved such that there are differing rules for Scotland from England, Wales and Northern Ireland. The impact of Brexit on public procurement will depend on the type of Brexit which occurs.

In its most recent guidance, Public-sector procurement after a no-deal Brexit, the UK government has confirmed 'business as usual' in relation to public procurement. If the UK's withdrawal from the EU is cancelled or delayed, the current regime will of course continue to apply. If the UK leaves the EU under some form of managed withdrawal agreement, such an agreement will contain provisions dealing with public procurement. The draft Withdrawal Agreement negotiated by the former Prime Minister (at Title VIII) confirms that the existing EU rules will apply until the end of any transition period, and to any public procurement process started during the transition period.

In the event of a no-deal Brexit (or so-called 'hard' Brexit), where the UK leaves all of the institutions of the EU without a managed withdrawal agreement, the UK has put in place amendment regulations which seek to ensure continuity of the existing legislative framework. The impact of these amendment regulations is set out below.

**What is the key Brexit-related legislation impacting the public procurement regime and what practical changes (if any) does it introduce? Is anything missing?**

The key Brexit-related public procurement legislation is listed below:

- Public Procurement (Amendment etc) (EU Exit) Regulations 2019, SI 2019/560
- Public Procurement (Amendment etc) (EU Exit) (No 2) Regulations 2019, SI 2019/623
- Public Procurement etc (Scotland) (Amendment) (EU Exit) Regulations 2019, SSI 2019/112
- Public Procurement etc (Scotland) (Amendment) (EU Exit) Amendment Regulations 2019, SSI 2019/114
- Defence and Security Public Contracts (Amendment) (EU Exit) Regulations 2019, SI 2019/697
- UK Statistics (Amendment etc) (EU Exit) Regulations 2019, SI 2019/489

These amendment regulations seek to ensure certainty in the event of a no-deal Brexit. The key operative provisions in the Public Procurement (Amendment etc) (EU Exit) Regulations 2019 and Public Procurement (Amendment etc) (EU Exit) (No 2) Regulations 2019 are to:

- replace references in the Public Contracts Regulations 2015, SI 2015/102 to the Official Journal of the European Union (OJEU) publication to a new UK e-portal system. The UK government has confirmed that this is called 'Find a Tender'

- removal of references to the EU from the Public Contracts Regulations 2015, SI 2015/102
- the right for the relevant Secretary of State to set public procurement thresholds
- a new provision to entitle the UK to withhold information which it considers contrary to the essential interests of its security in public procurement activity
- 18 months after exit day, further provisions would amend the regulations further in respect of:
  - conditions relating to the Government Procurement Agreement (see below)
  - life-cycle costing
  - duties owed to economic operators from certain other states

In a no-deal situation, the UK would apply to join the WTO Government Procurement Agreement (GPA), though there might be a slight delay in UK accession. Once completed, suppliers from the UK would be able to bid into EU contract opportunities under the terms of the GPA.

In the very short term, there is the risk that EU Member States seek to exclude UK suppliers from EU public procurement exercises before their rights are enshrined under the GPA. In contrast, the UK has already legislated to allow suppliers from GPA members (including the EU) to bid into the UK procurement processes for a fixed period of eight months after exit day.

In any event, it may be more difficult practically for UK suppliers to participate in or deliver EU public procurement projects, depending on the extent of any tariff/non-tariff barriers, immigration or other barriers to trade which could be imposed by the UK leaving the EU's internal market.

**If a deal based on the draft Withdrawal Agreement or similar is approved—what are the specific provisions for public procurement under the transitional arrangements?**

The specific provisions on public procurement set out in the draft Withdrawal Agreement are set out in Title VIII. This provides that the existing rules will apply to:

- procurement procedures launched (as defined in the Withdrawal Agreement) by contracting authorities of the UK under those rules before the end of the transition period and not finalised (as defined in the Withdrawal Agreement) on the last day of the transition period
- framework agreements or dynamic purchasing systems (DPS) set up either before the withdrawal date or during the transition period, and any call off contracts awarded under any such frameworks or DPS arrangements

If a withdrawal agreement based on the 25 November 2018 version is implemented, the Public Procurement (Amendment etc) (EU Exit) Regulations 2019 and other secondary legislation will not come into effect until at least the end of any transition period. It is possible that the changes will not come into force at all depending on policy decisions reached between the EU and the UK.

**In a no-deal Brexit scenario, what are the key differences contracting authorities must be prepared for on exit day? Are there any grey areas?**

In the event of a no-deal Brexit, the amendment regulations referred to above will apply on exit day, subject to the relevant commencement and transitional and saving provisions.

The main practical change will be that contract notices and other notices will not be sent to the OJEU. As set out above, there is also an imbalance between the rights of UK suppliers to participate in EU public procurement processes run by other EU Member States (at least until the UK becomes a signatory to the WTO GPA) and the rights of EU Member State suppliers to bid for UK public contracts.

The UK government has intimated that it is keen to maintain access to public procurement markets across the EU for UK contractors and that EU contractors should be able to continue to access UK opportunities. It is currently not clear what the UK government would choose in terms of a new public procurement regime. Possible options include:

*Maintain the current regime*

This has the advantage of being known and understood by UK contracting authorities and contractors and would involve minimal change and disruption to public sector supply chains in the short term. It is also possible, depending on the terms of any exit, that the EU seeks to require the UK to maintain the existing regime as a transitional step until new arrangements are agreed or as a requirement of any future co-operation arrangement. The EU has required compliance from other non-EU Member States in relation to public procurement, for example in the Ukraine/EU collaboration agreement

*Amend the rules*

This is in order to simplify and seek to speed up public procurement. This could involve merging the different rules for public contracts, concessions and utilities into one set of rules, freeing up use of the negotiated procedure still further and removing some of the more onerous procedural obligations on contracting authorities

A no-deal Brexit would create a range of potential uncertainties in relation to public procurement, including the jurisdiction of the Court of Justice in public procurement disputes.

**How would the UK's accession to the WTO GPA impact UK public procurement in practice?**

The WTO GPA is a plurilateral agreement, which means it is voluntary for WTO members to accede to it. It is formed of two sections, the agreement (which sets out the obligations to open up public procurement markets and to ensure base levels of transparency) and the market access schedules of commitments. The agreement will only apply to the relevant parts of the member's economy listed in the country's schedules.

There is unlikely to be significant immediate impact from the UK's accession to the GPA. The EU is a member of the GPA and all Member States take advantage of it via their EU membership. The EU public procurement rules embody many of the principles of the WTO GPA but develop these rules in many areas. It is possible that, in due course, the UK makes a policy decision to reform its public procurement rules to align these further with the WTO GPA as part of an overall simplification programme.

**How will Brexit impact procurement disputes and the relevance of EU procurement case law in the UK?**

There are detailed remedies rules in all of the public procurement directives and their corresponding implementing regulations in the UK. These remedies rules have been developed by extensive case law from both the EU and the UK courts.

In the event of a managed withdrawal, the current rules would apply until the end of any transition period. In the event of a no-deal Brexit, there are a range of potential outcomes, but the starting position is that the EU case law decided after exit day would be persuasive on the UK courts but the Court of Justice of the European Union would cease to maintain its jurisdiction over the UK.

In practice, it may be that the EU would require jurisdiction of the Court of Justice in relation to previous procurement processes started or completed before exit day. There is a very wide range of potential impacts of a no-deal Brexit, from enforceability of overseas judgments through the jurisdiction of the European courts which would need to be addressed.

**How does Brexit impact the drafting of public contracts? What guidance is available for contracting authorities drafting contracts for tender, eg using the Model Services Contract as a guide?**

Many contracting authorities (and suppliers) are making changes to their template public contracts in light of the uncertainty around Brexit. These changes are being made to tender documents, for example, to confirm that the procurement will continue regardless of the Brexit negotiations, as well as template contract terms and conditions. These changes include provisions to manage the risk of adverse changes in law affecting delivery of the contract, carving out Brexit as a force majeure event or seeking to limit the contractor's ability to increase prices due to Brexit. There is no 'one size fits all' for such provisions and each should be assessed on a case-by-case basis.

The UK government has published guidance to the public and private sectors on public procurement. The launch of the Find a Tender system has been confirmed, and which will replace the Tenders Electronic Daily system in the UK in the event of a no-deal Brexit.

**What can lawyers and contracting authorities do to prepare? Is Brexit delaying procurement planning and contract award decisions?**

Brexit-related uncertainty in the sphere of public procurement does not appear to be affecting public procurement processes in the UK, aside from a general reduction in public spending which has been seen in recent years. As Brexit draws closer, it is possible that public bodies delay significant procurement decisions until after the exit date to ensure legal certainty and the possibility of two different regulatory regimes applying to their procurements.

**What guidance is available from the UK government and the European Commission for contracting authorities preparing for Brexit?**

There is a wide range of information available from both the UK and EU in relation to Brexit preparedness and considerable commentary available on the impact on public procurement at www.gov.uk/brexit and www.europa.eu.

# No-deal Brexit: in practice

## Implications for lawyers

A no-deal Brexit scenario would no doubt alter the landscape for legal practitioners, however, there is great uncertainty over what will happen. It is likely complications will arise in terms of qualifications, practice restrictions and for firms with offices in the UK and EU. Iain Miller, partner and Jessica Clay, senior associate at Kingsley Napley, highlight the key points of interest and offer vital information for practitioners.

**What is the Qualified Lawyers Transfer Scheme (QLTS)? How would it be affected in the event of a no-deal Brexit?**

The QLTS is the scheme governing the process by which qualified lawyers seeking to be admitted as solicitors of England and Wales can transfer from another jurisdiction or from being a barrister of England and Wales.

At this time, the Solicitors Regulation Authority's (SRA) Qualified Lawyers Transfer Scheme Regulations 2011 underpin this process and set out the requirements qualified lawyers must meet in order to be admitted.

These include:

- being a qualified lawyer in a 'recognised jurisdiction' (this includes all jurisdictions to which the Recognition of Professional Qualifications Directive 2005/36/EC applies) and any jurisdiction which the SRA has determined to be one where qualified lawyer applicants:
  - have completed specific education and training at a level equivalent to a Bachelor's degree
  - are bound by an ethical code requiring them to act without conflicts of interest and to respect client interests and client confidentiality, and
  - are subject to disciplinary sanctions for breaches of their ethical code, including the removal of the right to practise
  - having followed a full route to qualification in the recognised jurisdiction
  - having 'entitlement to practise' as a qualified lawyer in the recognised jurisdiction—ie without restrictions on practice
  - being of the necessary character and suitability to be admitted as a solicitor of England and Wales, and
  - having passed all the QLTS assessments subject to any exemption(s) the SRA agrees

Under current legislation, EU qualified lawyers can apply for exemptions from the QLTS assessment on a topic-by-topic basis. Currently, no such exemptions are offered to lawyers from beyond the EU.

In the event of a no-deal Brexit, under World Trade Organization (WTO) rules, it will no longer be possible to offer this preferential treatment to EU qualified lawyers, as the WTO rules prohibit any favoritism with regard to jurisdictions. As a result, all foreign qualified lawyers will be able to apply for exemptions, but the SRA will only offer these on the basis that they cover the entirety of either or both parts of the QLTS. The SRA has indicated that whether it grants exemptions will continue to be determined on a case-by-case basis, based upon an applicant's qualifications and experience.

EU-based lawyers wishing to apply under the current exemptions regime can still do so, as long as their application is received before the date any no-deal Brexit becomes effective. Arrangements for qualified lawyers from Scotland and Northern Ireland will remain unchanged.

**How will Registered European Lawyers (RELs) be affected by a no-deal Brexit?**

The current REL regime allows EEA lawyers to register with the SRA and provide the full range of legal services (including reserved legal services subject to some restrictions) on a permanent basis in England and Wales. RELs can also work as sole practitioners.

In the event of a no-deal Brexit, the REL regime will come to an end, subject to a transitional period up to the end of 2020. Those already registered as RELs will be able to continue to practise until then, although there will be no new registrations allowed after the official exit day. Importantly though, those who have made an application to the SRA before exit day will be entitled to a decision on that application and if granted, they will be able to practise as an REL until the end of 2020.

Alternative routes will be available to RELs seeking admission into the solicitors' profession of England and Wales. During the transition period, if RELs satisfy the eligibility criteria, they can seek admission via the three year 'integration route'. Equally, they can seek admission under QLTS or via the new Solicitors Qualifying Examination (SQE) when this goes live. Alternatively, they can become a Registered Foreign Lawyer (RFL), but practising rights become more restricted. Those RELs currently practising as sole practitioners will need to qualify as a solicitor or make alternative arrangements to meet eligibility requirements. If they don't, it is likely they will need to close down their practice.

Following the end of the REL regime, European lawyers will continue to be able to practise in England and Wales under their home title (apart from the legal activities reserved to barristers and solicitors of England and Wales).

**How will a no-deal Brexit affect overseas offices of UK law firms? How are firms restructuring their operations to manage the consequences?**

Law firms with existing operations in the EU will need to review their existing structures to ensure they remain compliant with national company law and professional rules for legal practice in that host country on the basis lawyers of England and Wales will ultimately be classified as third-country lawyers.

EU based branches of UK LLPs or other entities will also want to review whether they can continue operating in the relevant EU Member State, or whether it would be better to restructure to become a national structure or a branch of a firm headquartered in another EU state. When reviewing firm structures, UK law firms will need to fully understand whether national rules in the EU Member State where the UK overseas office is based actually allow local (ie EU) lawyers to practise together with third-country (ie UK) lawyers. There may also be an impact on equity held, profit sharing and tax implications.

Firms will need to carefully consider their arrangements and take the necessary steps to make sure that they comply with the new regime so that, for example, clients are not left without adequate representation on exit day.

Importantly, EU membership currently allows UK lawyers to represent their clients before the EU courts and allows their clients to benefit from legal professional privilege (LPP) in front of EU courts and EU institutions. After the withdrawal date, UK qualified lawyers will lose their rights of audience before the EU courts, unless they hold alternative EU/EEA (but not a Swiss) qualification. UK lawyers should consider involving their EU/EFTA-qualified colleagues in ongoing cases to secure the application of LPP where applicable. This is likely to have a significant impact on certain practice areas, including competition law and intellectual property law. It will also affect a client's certainty as to whether their communications with lawyers are privileged, meaning that they cannot be disclosed in court. Clients of European lawyers practising in the UK will continue to enjoy legal professional privilege. This applies whether the European lawyer is advising on local law or the law of the country of qualification.

Overseas offices of UK law firms have many lawyers from different jurisdictions working in them or at least present in them at any one time. EEA lawyers currently have specific rights to provide reserved legal services (with some restrictions) on a 'fly in/fly out basis'. This allows lawyers who are authorised members of a profession in another EU Member State to provide services across borders within the EU on a temporary basis, under their home-country professional title.

In the event of a no-deal Brexit, these specific limited rights, to provide reserved legal services, will cease on exit day. UK lawyers will have to ensure that they are in compliance with the national law of the EU Member State concerned. Immigration controls may also be put in place between the UK and EU Member States and UK lawyers will need to ensure that they have any required visa and/or work permit in advance of travelling. The removal of the fly in/fly out rights should, however, not affect EEA lawyers' ability to come to the UK and provide non-reserved legal services on a temporary basis.

Switzerland will be dealt with differently. Separate arrangements are in place for UK lawyers practising in Switzerland. UK lawyers registered and working in Switzerland on a permanent basis under their home professional title before exit day will continue to be able to practise as they do now, provided they remain registered in Switzerland. UK lawyers also have a four-year period from exit day to register, or to start their application to register, to work in Switzerland under their UK professional title on a permanent basis or to transfer to the Swiss professional title. Other European lawyers as defined in the SI relating to the arrangements with Switzerland will be able to continue to provide services on a fly in fly out basis as currently for five years after exit day.

**If EEA lawyers opt to become RFLs following a no-deal Brexit, how will their practising rights differ from the REL regime?**

Until exit day, an EU qualified lawyer cannot become an RFL if they are practising in England and Wales on a permanent basis because they must have registered as an REL. After exit day, they will then have the option to register as RFLs, even when practising in England and Wales on a permanent basis.

Following a no-deal Brexit, any EEA lawyer who has not registered as an REL or qualified as a solicitor of England and Wales, but wants to be involved in the management or ownership of a law firm (which is not an alternative business structure) in England and Wales or work in partnership with solicitors will have to register as a RFL.

An RFL can practise the law of their home state and they can carry out or supervise any unreserved work—English legal work, foreign legal work (including business or financial advice or making business or financial arrangements)—that the firm is entitled to do. They also have rights to carry out limited reserved work independently and may carry out other reserved work at the discretion and under the supervision of a person who is qualified to supervise that work. They can also carry out or supervise foreign legal work which is reserved to lawyers of the RFL's home jurisdiction, provided they can do this within the rules of their own profession.

However, in general terms for an EEA lawyer who is not an REL to be able to do reserved work other than under supervision, they will have to qualify as a solicitor of England and Wales (or other regulated profession).

Further, an REL can presently practise here as a recognised sole practitioner. Following removal of the REL regime they will no longer be able to practise in this way. They must either qualify as a solicitor or arrange to close down their practice.

**What restrictions will be placed on UK lawyers practising in the EU in the event of a no-deal Brexit? Would registering in Ireland allow UK nationals to avoid these potential practice restrictions?**

The European Commission has stated that recognition decisions made on qualifications obtained in the UK before the exit date will not be affected.

In the event of a no-deal Brexit, UK nationals and EU nationals with UK qualifications, will no longer be able to rely on EU law principles relating to the recognition of professional qualifications—in the case of the former, this is because they will be 'third country nationals'. For recognition decisions that will be made post-Brexit, for both permanent establishment and temporary work purposes, UK nationals will need to check the relevant host country's policies—this is irrespective of whether the qualifications of the UK national were obtained in the UK, in another third country or even in an EU Member State.

The Republic of Ireland will remain an EU Member State. So, if you are a solicitor whose first place of qualification is England and Wales or Northern Ireland (but not Scotland), unless the Law Society of Ireland states otherwise, you will not need to pass any subject in the Irish Qualified Lawyers Transfer Test (QLTT). You will need to apply for a certificate of admission, and once granted, you can apply to join the Roll of Solicitors in Ireland. This will enable you to continue to benefit from the EU mutual recognition framework subject to any particular requirements or restrictions relating to non-EU nationals, which the Law Society of Ireland could choose to impose.

**UK nationals practicing law in Belgium have started obtaining Belgian citizenship to ensure their right of audience and right to lawyer-client legal confidentiality remain in the case of no-deal Brexit. Is this an option in any other EU country?**

There are reports of British lawyers seeking to take up Belgian citizenship on the basis that dual nationality will ensure they can continue to appear before European courts. Only citizens from the EEA are able to join the Belgian bar but the Belgian government has granted a stay of execution, meaning UK lawyers can still join it until 2021. Joining the Belgian bar is proving popular given that Brussels is regarded as a key centre for competition law, and many law firms and businesses have a presence there, which will enable UK lawyers with dual citizenship to continue to advise clients on matters concerning European law.

In other countries, having dual citizenship would not be an option in the case of a no-deal Brexit. For example, when taking German citizenship, citizens of another EU Member State are permitted to retain their current citizenship to become a dual citizen. However, citizens of non-EU Member States are required to give up their current citizenship in order to take German citizenship. The German Parliament is currently considering draft legislation that would provide legal clarity during any transition period associated with the draft Withdrawal Agreement—but the law would not apply under a 'no-deal' scenario.

The Law Society's advice remains that if you are eligible to acquire the nationality of an EU Member State, you may wish to consider doing so to ensure your EU free movement rights continue. A sensible starting point is to refer to the detailed guidance produced by the government in relation to each EU Member State, which provides information about relevant transition periods and rights to apply for residency in both the context of an orderly withdrawal and a no-deal Brexit.

# Retained EU law—a practical guide

Retained EU law is a legal concept introduced into UK law under the European Union (Withdrawal) Act 2018 (EU(W)A 2018). It captures EU-derived rights and legislation the government intends to retain and preserve in UK law for legal continuity after Brexit. There is no specific list of retained EU law for lawyers to refer to. It is a matter of statutory interpretation, a must-read for lawyers looking to understand this new legal concept. Kieran Laird, director and head of constitutional affairs at Gowling WLG, examines its meaning, scope and status, and provides essential tips for navigating and interpreting retained EU law.

**What is retained EU law?**

EU law takes effect in the UK through the European Communities Act 1972 (ECA 1972). ECA 1972 will be repealed by EU(W)A 2018, s 1 on 'exit day.' Exit day is defined in EU(W)A 2018 as 11 pm on 31 October 2019, although it may be extended again to 31 January 2020 under the European Union (Withdrawal) (No. 2) Act (EU(W)(N2)(A) 2019)

For the purposes of legal continuity, the government wishes to preserve, as far as possible, the legal position which exists immediately before exit day by taking a snapshot of all of the EU law that directly applies in the UK at that point and bringing it within the UK's domestic legal framework as a new category of law—retained EU law.

EU(W)A 2018 also provides powers for the government and devolved legislatures to amend retained EU law through statutory instruments (SIs) to ensure that it operates effectively after Brexit.

**When will the snapshot of retained EU law be taken?**

The intention in EU(W)A 2018 is to repeal ECA 1972 on exit day and for the snapshot to be taken just before that point.

However, the situation may be complicated by any withdrawal agreement negotiated between the UK and the EU27. The withdrawal agreement negotiated by the previous Prime Minister provides for a transition period until at least 31 December 2020, during which all EU law will continue to apply in the UK as it does now (and not in any amended UK version). EU(W)A 2018 is not drafted to accommodate this.

The simplest way to deal with this would be to amend the definition of exit day to align with the end of the transition period. That idea proved politically unpalatable for Theresa May's government, which instead intended to allow exit day to remain the point of exit from the EU. But with additional legislation saving certain parts of ECA 1972 during the transition period so that EU law would continue to flow through ECA 1972 into UK law.

However, whereas previously such a course was possible because ministers had a power under EU(W)A 2018 to change the definition of exit day, EU(W)(N2)(A) 2019 has changed this to a duty to amend the definition so that exit day aligns with the point at which the EU treaties cease to apply to the UK.

So, if a withdrawal agreement is approved by Parliament and contains a transition period as currently envisaged, the point at which retained EU law is created as a new category will be postponed (by one method or another) until the end of the transition period. If, however, the UK leaves the EU without a withdrawal agreement, the snapshot to create retained EU law will be taken immediately before exit day.

**What will the snapshot capture?**

Retained EU law will be made up of the four following components:

- EU-derived domestic legislation, EU(W)A 2018, s 2—secondary legislation made under ECA 1972, s 2(2) and other domestic legislation which implements EU obligations, made prior to exit day. This will include provisions in UK primary legislation
- direct EU legislation EU(W)A 2018, s 3—EU law that has direct effect in the UK prior to exit day, such as EU regulations and decisions:
  - the retained provisions will include those that are in force and apply before exit day, the effect of which will crystallise later. The explanatory notes to EU(W)A 2018 give the example of Regulation (EU) 517/2014 on fluorinated greenhouse gases. This regulation has been in force and applies since 2015 and prohibits the supply of equipment containing certain substances from specified dates, some of which fall after exit day. Because the latter prohibitions are in force now they will be retained, even though they do not apply until after exit day
  - however, EU(W)A 2018 carves out 'exempt EU instruments' (EU(W)A 2018, s 20(1) and Sch 6)—these are certain decisions and regulations which by virtue of certain protocols do not apply to the UK on exit day. This includes legislation on the Euro as well as certain freedom, justice and security measures that the UK did not opt into. Decisions of EU bodies aimed at other EU Member States are also carved out
  - where direct EU legislation is retained, it will be the English language text of such legislation that will be authoritative
- any remaining 'rights, powers, liabilities, obligations, restrictions, remedies and procedures' which are available in domestic law through ECA 1972, s 2(1 prior to exit day (EU(W)A 2018, s 4)—this will include rights under EU Treaties and directly effective provisions of directives which confer rights without the need for domestic implementation:
  - rights under directives will only be retained where they are 'of a kind' recognised by the Court of Justice or 'any court or tribunal' in the UK in a case decided before exit day EU(W)A 2018, 4(2)(b). What this will mean in practice is open to debate and is sure to be tested in the courts
- retained EU case law EU(W)A 2018, 6(7)—principles laid down by, and decisions of, the Court of Justice in relation to the above three categories which have effect in EU law before exit day, except where excluded by other parts of EU(W)A 2018

It should also be noted that the Charter of Fundamental Rights of the EU will not form part of retained EU law EU(W)A 2018, s 5(4)

In addition, no general principle of EU law will be retained unless it was recognised as such by EU case law before exit day. And even where it is retained, failure to comply with it cannot give rise to a right of action beyond three years from exit day (EU(W)A 2018, Sch 1, paras 2, 3).

**How are existing ambulatory references to EU law treated? How far do the provisions on interpretation of ambulatory references stretch? Do they extend to contracts or other legal documents?**

An ambulatory reference is a reference in a provision which cross-refers to a provision in EU law as it is amended from time to time. It therefore tracks the provision referred to as it changes over time. The ambulatory references which are dealt with in EU(W)A 2018 are those contained in:

- any enactment
- any EU regulation, EU decision, EU tertiary legislation or provision of the EEA agreement which will become part of retained EU law by virtue of EU(W)A 2018, s 3, or
- any document relating to anything falling into the above two categories

Where the reference is to a provision of direct EU legislation which becomes retained EU law under EU(W)A 2018, s 3 (EU regulations, decisions, tertiary legislation or provisions of the EEA agreement) the reference will track the retained version as it is amended by UK law from time to time (EU(W)A 2018, Sch 8, para 1).

Where the reference is to a provision in any other type of EU law, such as a directive, it will be read as a reference to the provision as it had effect immediately before exit day (EU(W)A 2018, Sch 8, para 2), save where an SI made under EU(W)A 2018 provides that the provision should be read in a particular way. An example is the Electricity and Gas etc (Amendment etc) (EU Exit) Regulations 2019, SI 2019/530, which makes specific provision for the way in which references in the Gas Act 1986 (GA 1986) to certain provisions in the Gas Directive 2009/73/EC are to be read.

The ambulatory references caught by EU(W)A 2018 are only those in particular types of legislation, legal instrument, or document. Ambulatory references in standard commercial contracts will not be caught and, depending on the drafting, it may be that these continue to track the subject provision as it is exists and develops in EU law.

In addition, ambulatory references will not be caught where they are contained in powers in retained EU law under EU(W)A 2018, s 2 (ie domestic law which

currently implements EU law) to make, confirm or approve subordinate legislation which is subject to a procedure before Parliament or the devolved legislatures.

**How are non-ambulatory references dealt with?**

The European Union (Withdrawal) Act 2018 (Consequential Modifications and Repeals and Revocations) (EU Exit) Regulations 2019 deal with non-ambulatory references to various EU instruments that exist immediately before exit day in:

- any domestic enactment
- any EU regulation, EU decision, EU tertiary legislation or provision of the EEA agreement which will become part of retained EU law by virtue of EU(W)A 2018, s 3

Where the provision referred to is part of retained EU law under EU(W)A 2018, s 3 and has not been modified under EU(W)A 2018, then the reference is to the provision as retained.

In all other cases, including where the direct EU law referred to has been modified, the reference is to be read as a reference to the relevant provision as it existed at the time that the provision containing the reference became law.

**What are the key rules for application and interpretation of EU-derived laws in the UK pre and post exit day?**

Currently, under the principle of supremacy of EU law, where there is a conflict between EU law and UK domestic law, the latter is disapplied. Indeed, a conflict with EU law is the only basis on which a UK judge can disapply an Act of Parliament.

The existing hierarchy will be retained in relation to domestic laws passed before exit day section 5(2) of the EU(W)A 2018. So, for example, where an Act of the UK Parliament passed before exit day conflicts with a regulation of EU origin retained under EU(W)A 2018, s 3, the retained regulation will prevail.

However, after exit day, the principle of supremacy of EU law will not apply to any domestic law passed after exit day (EU(W)A 2018, s 5(1)). So domestic law passed after exit day will trump provisions in retained EU law that are of EU origin and which would have benefitted from the principle before Brexit.

Any question as to the meaning of a provision of retained EU law which has not been modified by UK law is to be decided by reference to relevant domestic case law and pre-exit EU case law (where retained) and the general principles of EU law insofar as these have been retained (EU(W)A 2018, s 6(3)).

So, a UK court will follow the case law of the EU courts before exit day when interpreting unmodified retained EU law (even the approach in EU case law subsequently diverges).

However, a court or tribunal in the UK will not be bound by any decisions of the EU courts which are handed down after exit day (EU(W)A 2018 s 6(1)). It can, however, have 'regard' to any decision of the Court of Justice or any other EU entity, made after exit day where this is relevant to the matter before it (EU(W)A 2018, s 6(2)).

The Supreme Court is not bound by retained EU case law and neither is the High Court of Justiciary when sitting in relation to certain matters of Scottish law (EU(W)A 2018, s 6(4)). They may depart from retained EU case law where they consider it appropriate to do so.

**Can retained EU law be challenged? If so, how? Are there any particular areas where a challenge is likely?**

Domestic law which becomes retained EU law by virtue of EU(W)A 2018, s 2 will continue to be classed as primary or secondary legislation as relevant (EU(W)A 2018, s 7(1)).

The primary legislation which falls within EU(W)A 2018, s 2 will be capable of challenge only on the basis that it contravenes another provision of retained EU law which would have benefitted from the principle of supremacy. The secondary legislation which falls within EU(W)A 2018, s 2 can be challenged on the same basis, as well as on the same general public law grounds as any other secondary legislation.

Under EU(W)A 2018, Sch 1, para 1, no provision of retained EU law can be challenged on or after exit day on the basis that an EU instrument, such as an EU regulation or decision, was invalid. However, this preclusion does not apply where the Court of Justice has found the EU instrument to be invalid prior to exit day, or where regulations made by a minister allow the challenge.

The only regulations made under this provision thus far—the Challenges to Validity of EU Instruments (EU Exit) Regulations 2019, SI 2019/673—allow the courts to decide challenges to the validity of EU instruments which have been begun before exit day but are not yet concluded.

EU(W)A 2018 draws a distinction between:

- retained direct principal EU legislation—EU regulations which are not tertiary legislation, and annexes to the EEA agreement, retained under EU(W)A 2018, s 3, and
- retained direct minor legislation—all other EU law retained under EU(W)A 2018, s 3 (mainly tertiary legislation and decisions of EU bodies)

Retained direct principal EU legislation is treated as primary legislation for the purposes of challenges under the Human Rights Act 1998 (HRA 1998), ie it can be found incompatible, but that finding does not affect continued validity. Conversely, retained direct minor EU legislation is treated as subordinate legislation for HRA 1998 purposes, so it can be disapplied if found to be incompatible (EU(W)A 2018, Sch 8, para 30).

The majority of challenges are likely to be in relation to modifications made to retained EU law by Ministers using the powers conferred by the EU(W)A 2018. EU(W)A 2018, s 8 confers broad powers to amend retained EU law to ensure that it operates effectively or to remedy any other deficiency within it. Deficiencies are defined widely in EU(W)A 2018, s 8(2).

These powers caused a great deal of debate during the passage of EU(W)A 2018 and continue to be controversial. Practitioners will be scrutinising carefully whether any amendments made to retained EU law are within the powers conferred by EU(W)A 2018, s 8, and it is almost certain that some will be challenged.

**What are your top tips for navigating retained EU law?**

Firstly, be absolutely clear about what will be retained and what will not. The big issue here will be around rights in EU directives which, unlike directly applicable EU legislation, will not automatically be retained. Be prepared to do some digging in the case law to establish whether or not a particular right is retained, and be prepared to argue your position.

Secondly, be aware of the form in which a particular piece of legislation has been retained. Hundreds of statutory instruments amending retained EU law have been passed so far, with some pieces of legislation amended by several different SIs.

Thirdly, keep an eye on the courts as the application of EU(W)A 2018, and the validity of the SIs made under it, will be the subject of much judicial consideration over the next few years. Remember that decisions of Court of Justice made before exit day will be binding on UK courts and tribunals (except the Supreme Court and High Court of Justiciary as noted above), but not those made after exit day—although the latter should be referenced where relevant as the domestic court or tribunal may take account of them.

Finally, be alive to situations in which advice is required on both retained EU law (in the UK) and EU law (in the EU27). There are times when clients operating in both jurisdictions will need to know the differences between the two bodies of law and the effect that such differences may have on the client's operations.


# Recognition and enforcement of UK judgments in France post no-deal Brexit

Andrew Tetley, counsel and Nicolas Lefèvre, associate, both at Reed Smith, discusses how UK judgments in France would be recognised following the UK leaving the EU without a deal.

**How UK judgments are currently enforced in France?**

UK judgments are currently enforced in accordance with Regulation (EU) 1215/2012 of the European Parliament and of the Council of 12 December 2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (Regulation (EU) 1215/2012, Brussels I (recast)).

Since the coming into force of this Regulation on 10 January 2015, it is no longer necessary to obtain a declaration of enforceability (exequatur) before French courts prior to enforcing UK judgments in France.

The creditor of a UK enforceable judgment need only provide:

- a copy of the judgment which satisfies the conditions necessary to establish its authenticity
- a certificate issued by the UK court certifying that the said judgment is enforceable

In practice, it is also advisable to have a translation in French of the judgment and of the certificate.

A French bailiff can carry out enforcement measures with the above-mentioned documents at their disposal, without having to notify the judgment debtor beforehand.

**Will that enforcement regime no longer apply following a no-deal Brexit?**

The current enforcement regime is based on EU law and its application is limited to EU Member States only.

After a no-deal Brexit, the UK will no longer be subject to EU law. Therefore, Regulation (EU) 1215/2012, Brussels I (recast) will no longer apply to the enforcement of UK judgments in France. This is confirmed by the Commission in its notice to stakeholders dated 18 January 2019. The only exception to this rule concerns UK decisions that have been exequatured prior to the withdrawal date.

**Will the bilateral treaty for enforcement of civil and commercial judgments in use prior to the EU regulations coming into force be applied by the French courts?**

This question remains open at this stage. Assuming that no deal is reached between the EU and the UK regarding Brexit, it could be envisaged to apply the bilateral convention signed on 18 January 1934 between France and the UK providing for the reciprocal enforcement of judgments in civil and commercial matters. However, it cannot be stated with certainty that this convention shall necessarily apply in the event of a hard Brexit.

Some authors are of the view that the 1968 Brussels Convention on jurisdiction and the enforcement of judgments in civil and commercial matters should be applied (the UK signed an accession convention in 1978 to accede to the 1968 Convention). The 1968 Convention, now replaced by Regulation (EU) 1215/2015, has never been abrogated per se, and could therefore arguably be revived and apply again. However, it is important to note that this is not the UK position given that the Civil Jurisdiction and Judgments (Amendment)(EU Exit) Regulations 2019, SI 479/2019 provides that any rights, powers, liabilities, obligations, restrictions, remedies and

procedures derived from the Brussels Convention will cease to be recognised and available in UK law (and to be enforced, allowed and followed accordingly) on exit day.

**If not, what will be the process for enforcement of a UK judgment in France post exit day?**

In the absence of any convention or bilateral treaty between France and the UK, the existing exequatur procedure (set out in the French Code of Civil Procedure) would be invocable in order to recognise and enforce UK judgments in France.

The judgment creditor would need to commence adversarial proceedings before the relevant jurisdiction. Recourse to a French avocat, who will draft a subpoena served to the defendant, is mandatory in such proceedings.

The French judge will ensure that the following conditions are cumulatively met by the UK judgment before granting exequatur:

- the UK court had proper jurisdiction under French law
- it complies with French procedural and substantive public policies
- it was rendered without fraudulent forum shopping

**If enforcement of a UK judgment is not completed prior to exit day can the judgment creditor change enforcement regimes to ensure enforcement of the UK judgment?**

In the event of a hard Brexit, a judgment creditor will likely have to comply with the post-Brexit regime. The French Cour de cassation took up a position on this question some time ago, affirming the principle of immediate application of procedural laws to pending proceedings. Thus, in theory at least, uncompleted enforcement procedures would be governed by the post-Brexit regime.

# Recognition and enforcement of UK judgments in Germany post no-deal Brexit

Dr Kathrin Nordmeier, counsel at Noerr LLP in Frankfurt, discusses how UK judgments in Germany would be recognised following the UK leaving the EU without a deal.

**How are UK judgments currently enforced in Germany?**

UK judgments in civil and commercial matters are currently enforced in Germany under Regulation (EU) No 1215/2012 (Brussels I (recast)) on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters. Pursuant to Article 36(1) of Brussels I (recast) a judgment given in a Member State of the EU shall be recognised—and hence enforced—in the other Member States without any special procedure being required. In principal, a party who wishes to enforce a UK judgment in Germany needs to produce a copy of the judgment that satisfies the conditions necessary to establish its authenticity and the certificate issued pursuant to Article 53 of Brussels I (recast). The latter is issued by the court of origin and confirms that the judgment falls within the scope of Brussels I (recast). Brussels I (recast) makes it possible to directly start enforcement proceedings without the need to obtain a declaration of enforceability from the German courts first.

The non-recognition of a judgment by the recognising Member State can only occur upon the application of an interested party if that party successfully argues that one of the reasons listed in Article 45(1) of Brussels I (recast) applies. If an application requesting that recognition be refused on the basis of one of those grounds has been submitted, the court before which enforcement of the judgment is sought may suspend the enforcement proceedings. As suspension of the enforcement proceedings is not mandatory, it is possible to continue enforcing the judgment at issue while the proceedings regarding its enforceability are pending.

**Will that enforcement regime no longer apply following no-deal Brexit?**

Article 36(1) of Brussels I (recast) only applies to judgments given in a Member State of the EU. As the UK will no longer be a Member State once Brexit occurs, the regime provided for by Brussels I (recast) will cease to apply after a no-deal Brexit.

**Will the bilateral treaty for enforcement of civil and commercial judgments in use prior to the EU regulations coming into force be applied by the German courts?**

German courts are likely to apply the Convention for the Reciprocal Recognition and Enforcement of Judgments in Civil and Commercial Matters that Germany and the UK entered into on 14 July 1960 (German-British Convention). The German-British Convention allows for the enforcement of judgments in civil and commercial matters over a specified amount for a definite sum of money. Further, per Article VII of the German-British Convention, to enforce a UK judgment in Germany, one must first apply for, and receive, a declaration of execution from the appropriate German court. Article III of the German-British Convention lists potential reasons for the denial of recognition and enforcement that go beyond the reasons listed in Brussels I (recast). Hence, judgments that are recognisable and enforceable under that regulation may no longer be recognised and enforced after Brexit. In addition, the question of whether reasons for the denial of recognition and enforcement of a judgment exist will be decided in the exequatur proceedings. Enforcement

proceedings can only start after the German court issues a judgment for the declaration to execute. This will lead to substantial delays and increase the costs when enforcing a UK judgment in Germany.

**If not, what will be the process for enforcement of a UK judgment in Germany post exit day?**

The German-British Convention only applies to judgments over a definite sum of money. Accordingly, the German courts are likely to apply the general rules for the recognition and enforcement of judgments under section 722, subsection 328 of the German Code of Civil Procedure (German CCP) to any other UK judgment German CCP, s 722, subs 328, provides for the need of exequatur proceedings. Hence, as under the German-British Convention and unlike the regime of Brussels I (recast), enforcement cannot start before the question of enforceability has been decided.

**If enforcement of a UK judgment is not completed prior to exit day can the judgment creditor change enforcement regimes to ensure enforcement of the UK judgment?**

The enforcement regimes under Brussels I (recast), on the one side and under the German-British Convention, respectively the German CCP, on the other side differ in so far as under the regulation, there is no need for exequatur proceedings. Hence, one can apply directly to the court competent for the enforcement proceedings. The latter is a different court than the court competent for the exequatur proceedings under the German-British Convention, respectively the German CCP. Accordingly, if the court concludes that the judgment creditor has started the wrong enforcement proceedings, the court will end these proceedings and the judgment creditor will have to file a second application under the proper regime.

It is uncertain what view the German courts will take regarding the proper enforcement proceedings. The crucial question is how the German courts, respectively the European courts, will interpret the wording in Article 36(1) of Brussels I (recast) as to what constitutes a judgment 'given in a Member State'. One can argue that 'given in a Member State' means that the country of origin of the judgment must be a Member State throughout the enforcement proceedings, or one can argue that it is sufficient that the country of origin was a Member State when the judgment was rendered. There are arguments for and against both views. Hence, there will be some uncertainty regarding judgments rendered in the UK before Brexit but for which enforcement proceedings have not yet been started or have not yet been completed when Brexit occurs.

# Recognition and enforcement of UK judgments in Italy post no-deal Brexit

Massimiliano Danusso, partner at BonelliErede, discusses how UK judgments in Italy would be recognised following the UK leaving the EU without a deal.

**How are UK judgments currently enforced in Italy?**

The current legal regime which governs the enforcement of UK judgments in Italy is underpinned by EU law. The principal instrument relating to the enforcement of judgments of EU Member State courts is Regulation (EU) 1215/2012 (Brussels I (recast)) on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters. In particular, pursuant to Article 39 of the Regulation (EU) 1215/2012, Brussels I (recast), a judgment, whose definition under the regulation is very broad in nature, which is enforceable in the UK shall be equally enforceable in any other Member State (including Italy) without any declaration of enforceability being required.

For the purposes of enforcement, under Article 42 of Regulation (EU) 1215/2012, Brussels I (recast), the applicant shall provide the competent Italian court with:

- a copy of the judgment which satisfies the conditions necessary to establish its authenticity
- a certificate, issued by the court of origin, certifying that the judgment is enforceable

Where the judgment is a provisional (including a protective) measure, the applicant shall provide the competent enforcement authority, in addition to the documents set out above, with a proof of service of the judgment, if the measure was ordered without the defendant being summoned to appear. Pursuant to Article 43 of Regulation (EU) 1215/2012, Brussels I (recast), prior to the first enforcement measure, the certificate and the judgment, accompanied by a translation into a language that the judgment debtor understands, shall be served on the person against whom the enforcement is sought. The specific procedure for the enforcement of judgments is then governed by the law of the Member State addressed, according to Article 41(1) of Regulation (EU) 1215/2012, (Brussels I (recast)).

**Will that enforcement regime no longer apply following no-deal Brexit?**

As stated by the European Commission in its 'Notice to Stakeholders—Withdrawal of the UK and EU rules in the field of civil justice and private international law' dated 18 January 2019 (the Notice to Stakeholders), subject to the transition period provided for in the Withdrawal Agreement, as of the withdrawal date, the EU rules in the field of justice and private international law no longer apply to the UK. This means that Regulation (EU) 1215/2012, Brussels I (recast) and its provisions, which relies on reciprocity, will likely cease to apply and proceedings to enforce UK judgments will be subject to national rules, unless the UK and the EU agree that this regulation or an equivalent arrangement will continue to apply on a reciprocal basis.

**Will the bilateral treaty for enforcement of civil and commercial judgments in use prior to the EU regulations coming into force be applied by the Italian courts?**

The UK, in the past, has entered into bilateral treaties for the mutual recognition and enforcement of judgments with different countries, including Italy. In particular, the Republic of Italy, before Regulation (EU) 1215/2012,

Brussels I (recast) came into force, ratified two treaties with the UK on this subject matter, respectively on 7 February 1964 and 14 July 1970. It is difficult to say whether an Italian court will apply these treaties as they were superseded for nearly all purposes by the current Brussels I (recast) regime. Specifically, Article 69 of Regulation (EU) 1215/2012, Brussels I (recast) provides that the regulation shall, as between Member States, supersede the conventions that cover the same matters as those to which the regulation applies. In any case, pending a clarification from the European Union on this issue, it is worth noting that the bilateral treaties mentioned above have a narrower scope as compared to that of the Brussels I (recast), as the old regime would apply only to money judgments. Moreover, the procedure is more cumbersome (ie the judgment creditor has to request the court to issue an efficacy declaration of the judgment) and the enforcement can be set aside on the grounds that similar proceedings are pending in the other jurisdiction between the same parties or that the judgment debtor appealed the decision before the court of origin.

**If not, what will be the process for enforcement of a UK judgment in Italy post Brexit?**

In this very uncertain scenario, as the European Commission noted in the Notice to Stakeholders and in the subsequent Questions and Answers related to the UK's withdrawal from the European Union in the field of civil justice and private international law dated 11 April 2019 (the Q&A), the enforcement would be very likely governed by the domestic Italian rules. According to the Italian Statute on International Private Law no 218/1995, an enforcement can take place only if the relevant judgment has already become final and binding between the parties. Moreover, the judgment must be recognised in Italy through a specific procedure which is held before the appropriate Italian court, known as the exequatur. Therefore, it is only once the judgment has become final and binding and it has been exequatured, that enforcement proceedings can be commenced. It is also possible that in certain circumstances, for instance in cases of enforcement of a UK judgment issued by a court designated in a qualifying exclusive jurisdiction agreement, a UK judgment may be enforced according to the provisions set forth in the 2005 Hague Convention on Choice of Court Agreements (the Convention). In this respect, the position of the European Commission as set out in the Q&A is that the Convention will only apply to exclusive choice of court agreements concluded after its entry into force for the UK (ie only after the UK has become a party to the Convention).

If enforcement of a UK judgment is not completed prior to exit day can the judgment creditor change enforcement regimes to ensure enforcement of the UK judgment?

The European Commission has clarified in the Notice to Stakeholders and the Q&A that unless a UK judgment has been exequatured before the withdrawal date, Brussels I (recast) will not apply to a UK judgment which has not been enforced before the withdrawal date, even where the enforcement proceedings were commenced before that date. It seems therefore to follow that in such circumstances a judgment creditor should be allowed to change the relevant enforcement regime to complete and ensure the enforcement of a UK judgment.

# Recognition and enforcement of UK judgments in Singapore post no-deal Brexit

Shaun Lee, counsel at Bird & Bird, discusses how UK judgments in Singapore would be recognised following the UK leaving the EU without a deal.

**How are UK judgments currently enforced in Singapore?**

Generally, a judgment of a foreign court may only be recognised and enforced under the domestic laws of the enforcing state, unless that enforcing state is bound by enforcement obligations under a treaty (bilateral or multilateral). Presently, such treaties are given force of law in Singapore through the following acts:

- Reciprocal Enforcement of Commonwealth Judgments Act (Cap 264) (RECJA)
- Reciprocal Enforcement of Foreign Judgments Act (Cap 265) (REFJA)
- Maintenance Orders (Reciprocal Enforcement) Act (Cap 169, 1985 Rev Ed) (MOREA)
- Choice of Court Agreements Act (Cap 39A, 2017 Rev Ed) (CCAA)

Absent an applicable treaty, a foreign final money judgment that is sought to be enforced in Singapore would have to be done by way of common law through the commencement of a fresh suit in the Singapore courts.

A UK judgment can therefore be recognised and enforced pursuant to RECJA, which applies to the judgments of the superior courts of ten Commonwealth nations, including the UK. Further, the CCAA gives effect to the Hague Convention of 30 June 2005 on Choice of Court Agreements (the 2005 Hague Convention), whose ratifying states include the EU and thus presently the UK.

Where a foreign judgment is sought to be recognised and enforced in Singapore under RECJA or the CCAA, the process is substantially easier than under common law—the registration application is made ex-parte and is primarily a formalistic one. The default practice for registration under RECJA is a light touch one where registration of foreign judgments is permitted unless certain formal features are missing. The onus is then on the judgment debtor to seek to set aside the registered judgment. There has only been one reported decision regarding enforcement under the CCAA, and in which the Singapore High Court required a hearing on an ex-parte basis before it recognised a UK summary judgment (*Ermgassen & Co Ltd v Sixcap Financials Pte Ltd* [2018] SGHCR 8).

**Are there any potential issues with the enforcement regime continuing to apply following no-deal Brexit?**

There ought not to be any potential issues regarding the applicable regime in Singapore since both RECJA and the CCAA will continue to apply to UK civil and commercial judgments following a no-deal Brexit. Nevertheless, there is a real risk that the CCAA will not apply to existing UK exclusive choice of court agreements and UK judgments issued pursuant to the same.

Prior to 28 December 2018, there would have been concerns that a no-deal Brexit would result in the UK no longer being a contracting party to the 2005 Hague

Convention by virtue of it no longer being a member of the EU post a no-deal Brexit. However, on 28 December 2018, the UK deposited its instrument of accession to the 2005 Hague Convention. In the event of a no-deal Brexit, the UK would ascend to and be bound by the 2005 Hague Convention as an independent contracting state.

However, there is a real risk that this would result in a situation where only UK judgments issued pursuant to UK exclusive choice of court agreements, which agreements were entered into after exit day and the corresponding ascension of the UK to the 2005 Hague Convention, would thereby be recognised and enforced under the CCAA. This is because section 24(2) of the CCAA expressly provides that it 'does not apply to an exclusive choice of court agreement that designates a court of another Contracting State as a chosen court, if the agreement is concluded before the Convention enters into force in that Contracting State'.

In the circumstances, it is unclear if the Singapore courts (or parliament through legislative amendments) would choose to continue to give effect to UK exclusive choice of court agreements entered into prior to exit day and the UK ascension to the 2005 Hague Convention on the basis of the UK had been an EU member and thereby a contracting state to the 2005 Hague Convention.

**Will the Reciprocal Enforcement of Commonwealth Judgments Act (Cap 264) (RECJA) and the Reciprocal Enforcement of Foreign Judgments Act (Cap 265) (REFJA) be applicable for enforcement of UK civil and commercial judgments?**

The RECJA will continue to apply to final money judgments of the superior courts of UK post exit day of a no-deal Brexit.

Presently, REFJA only applies to final money judgments of the superior courts of Hong Kong, SAR. However, the Singapore's Ministry of Law has recently introduced amendments to REFJA, to be effected through the Reciprocal Enforcement of Foreign Judgments (Amendment) Bill (the Amendment Bill).

The Amendment Bill was introduced in Parliament on 5 August 2019 and seeks to expand the types of judgments from a foreign country which may be registered and enforced under the amended REFJA on a reciprocity basis. It is expected that the jurisdictions designated under REFJA will go beyond just Hong Kong.

Substantive amendments in the Amendment Bill include expanding the definition of 'judgment' beyond final or monetary judgments, the judgments of foreign 'superior' courts, as well as creating new grounds for refusing, setting aside registration and/or limiting enforcement of a registered foreign judgment. The Amendment Bill also essentially seeks to consolidate both RECJA and REFJA. This is because, in the event that the minister extends the amended REFJA to a reciprocating Commonwealth jurisdiction, then RECJA will cease to have effect to that Commonwealth jurisdiction.

The Ministry has also expressed that the Amendment Bill will not impact the CCAA. Absent any amendments or subsidiary legislation to the CCAA, there is a real risk that all existing UK exclusive choice of court agreements and UK judgments issued pursuant to the same would not be recognised and enforced under the CCAA in the event of a no-deal Brexit and the UK's ascension to the 2005 Hague Convention as an independent contracting state.

For further details, see News Analysis: Singapore proposes amendments to legislation for the enforcement of foreign judgments.

**If enforcement of a UK judgment is not completed prior to the exit day of a no-deal Brexit, can the judgment creditor change enforcement regimes to ensure enforcement of the UK judgment?**

Insofar as there are no envisaged changes to the enforcement regime of foreign judgments in Singapore prior to exit day, there would be no need for a judgment creditor to change enforcement regimes to ensure enforcement of the UK judgment. Such UK judgments would remain enforceable under RECJA or the CCAA (assuming continuity despite the UK's change of status as contracting State under the 2005 Hague Convention).

Even if the Amendment Bill is passed prior to exit day and the UK is designated as a jurisdiction to which REFJA applies, the recognition and enforcement of a UK judgment under REFJA would only be applicable if the UK judgment is made on a date after the date on which the UK is designated as a jurisdiction under REFJA.

As regards the CCAA, insofar as the UK is an overlapping jurisdiction under RECJA and the CCAA, a judgment creditor could choose to enforce a final money judgment of a UK superior court through RECJA in the event that the CCAA is no longer applicable by virtue of no-deal Brexit.

# No-deal Brexit: in detail

## No-deal immigration arrangements for EU citizens moving to the UK after Brexit—what we need to know

Laura Devine, managing partner at Laura Devine Immigration, tells us what we need to know about the new Home Office guidance on European Economic Area (EEA)/Swiss nationals (and their family members) entering the UK after exit day in the case of a no-deal Brexit.

**In summary, what does this guidance say about EEA nationals looking to enter the UK after exit day in a no-deal situation?**

In a no-deal scenario, EEA/Swiss nationals entering the UK after exit day are unlikely to see immediate changes to their ability to travel to the UK and seek work (requiring only a valid passport/ID card to do so, as present). However, they will be subject to a new immigration system—the European Temporary Leave to Remain (Euro TLR) scheme—if they wish to remain in the UK after 31 December 2020.

The Euro TLR scheme is intended to be a simple and free online process involving identity, security and criminality checks (procedurally similar to the EU Settlement Scheme applicable to EEA/Swiss nationals resident in the UK before exit date). Despite much criticism, status under the Euro TLR scheme is expected to be evidenced digitally (as with the EU Settlement Scheme), not as a hardcopy original document.

Under the Euro TLR, leave to remain will be granted for three years, running from the date of grant (rather than the date of entry of the EEA/Swiss national), thereby staggering the impact of the end of free movement as we currently know it. After completing three years' leave to remain under the scheme, EEA/Swiss nationals would either need to leave the UK or meet the rules in place at the time to remain in the UK in another immigration category.

While time spent in the UK under the Euro TLR will not directly lead to settlement (and will not be extendable beyond three years), such time may be amalgamated with leave under another eligible category of the Immigration Rules (eg Innovator, Tier 2 (General), Tier 1 (Investor), etc) to count towards the qualifying five-year continuous residence period for indefinite leave to remain.

The Euro TLR will only apply to EEA/Swiss nationals arriving between exit (11pm 31 October 2019) and 31 December 2020. Those arriving from 1 January 2021 would be required to meet the criteria under the new immigration system which is expected to come into effect from the same date. While a detailed White Paper on the new immigration system was published in December 2018 (see Practice Note: Immigration after Brexit: the government White Paper), under Theresa May's government, we expect the final version to be quite different to its original incarnation, given the new Prime Minister's fondness of the Australian points-based system and following, for example, this week's announcement of the government's intention to reopen the post study work route and allow graduates a two-year immigration permission after they complete their studies.

A Migration Advisory Committee consultation on the new system is currently under way and while we are awaiting further detail on its exact mechanics, we do know that it is expected to apply equally to EEA/Swiss and non-EEA/Swiss nationals.

Employers will not need to identify whether an EEA/Swiss national worker first entered the UK before or after 31 October 2019 and may continue to accept an EEA/Swiss passport or national ID card as proof of the right to work until 31 December 2020 (after which a worker's digital status under the Euro LTR will need to be demonstrated for any new hires—this will not apply retrospectively to those who commenced work before that date).

**How is this different from the previous position set out by the Home Office?**

The Euro TLR scheme was designed by Theresa May's government as a transitional arrangement between the total flexibility of free movement and the potential cliff-edge effect of ending free movement without any period for employers to adjust. While the scheme has mostly stayed intact since its original incarnation, there are some welcome changes—something of a surprise after several weeks of the new administration hinting at a harder line and hailing an immediate end to free movement on 31 October 2019.

The latest guidance from the Home Office suggests that EEA/Swiss nationals would no longer be required to apply within three months of their initial entry to the UK, as was the original intention. The scheme is now described as 'voluntary' and will only be required for those wishing to remain in the UK after 31 December 2020—the no-deal deadline for applications under both the Euro TLR and the EU Settlement Scheme (though many may wish to apply sooner).

Another important change is the ability to count time spent under the Euro TLR scheme towards the continuous lawful residence for the purposes of five-year settlement applications when amalgamated with time spent under another immigration category which leads to indefinite leave to remain in the UK.

**Who do the Home Office consider to be 'serious or persistent criminal'?**

As stated, applicants under the Euro TLR will be subject to security and criminality checks, with specific emphasis on criminal conduct committed after Brexit. While we are awaiting further details on the specifics of the suitability requirement under the Euro TLR scheme, the EU Settlement Scheme gives us some indication on what we may expect. It currently states that EU Settlement Scheme applications will be refused if the applicant is 'a serious or persistent criminal, a threat to national security, or has [received] a deportation order, exclusion order, exclusion decision or removal decision'.

While there is no minimum number of criminal convictions for an offender to be perceived as 'persistent', it would include individuals who have shown a particular disregard for the law, involving a case-specific assessment of the nature, extent, seriousness and impact of the person's offending. The seriousness of the offence would normally include an assessment of the degree of public nuisance and the cost of reoffending.

**How do you see the Euro TLR working in practice? Where can we find more information about this?**

While the provision of additional information on the no-deal transitional arrangements for EEA/Swiss nationals and their employers is to be welcomed in helping reduce uncertainty and fears of a cliff-edge skills crisis, practical concerns remain.

The prospect of running two parallel systems—the Euro TLR and the EU Settlement Scheme—is very likely to cause confusion for applicants and employers alike, with individuals being unsure of which system applies. Given the lack of passport endorsements for EEA/Swiss nationals on entry to the UK, establishing when they arrived in the UK (and accordingly which scheme applies) will be challenging for many applicants—and confusing for those required to undertake checks such as employers, landlords, banks and the NHS, also raising concerns of discrimination.

Furthermore, the issues experienced by the relatively recent rollout of the EU Settlement Scheme, such as technical problems and longer than published processing times, are only likely to be exacerbated by the addition of a further new application system for those arriving after exit day in the event of a no-deal.

Inevitably, given the huge numbers involved, a proportion of eligible EEA/Swiss nationals and family members will not apply under the Euro TLR or the EU Settlement Scheme by the 31 December 2020 deadline (for a range of reasons, including lack of awareness and obstacles to accessing the application system), rendering them unlawfully present in the UK.

# What steps can immigration practitioners take to prepare for a no-deal Brexit?

The government recently updated its policy paper on 'No-deal immigration arrangements for EU citizens arriving after Brexit', which sets out the different arrangements that will apply after the UK leaves the EU on 31 October 2019. Luke Piper, solicitor at South West Law, explores and discusses the implications of a no-deal Brexit for EU citizens currently living in the UK and for those entering the UK after Brexit, and the steps that practitioners should take to prepare.

## How clear is the position for immigration?

*Withdrawal Agreement and EU/UK citizens' rights*

Following the Brexit referendum in 2016, the then UK government entered intense negotiations with the EU resulting in the Withdrawal Agreement and Political Declaration (the deal). The Withdrawal Agreement sets out the terms of settlement between the UK and the EU and the Political Declaration details the intentions for a future relationship. The Withdrawal Agreement, among other things, sets out how EU citizens living in the UK and UK citizens living in the EU will have their rights protected once the UK leaves the EU. This analysis will refer to EU citizens which includes nationals of the EU, the European Free Trade Association (EFTA) and Switzerland, and their non-European Economic Area (EEA) family members, unless stated otherwise.

That deal failed to be endorsed by the UK House of Commons and has not been implemented. Unless decided otherwise, the UK is set to leave the EU (at the time of writing) on 31 October 2019 (exit day).

While assurances are made by the current UK government, led by Boris Johnson, that a deal between the EU and the UK will be approved by the UK Parliament prior to exit day, preparations for the UK's departure without a deal have been escalated.

*Immigration policy and no-deal Brexit*

Some preparations have been established in relation to the UK's immigration policy relating to EU citizens inside the UK. There are some crossovers between the arrangements and aspirations in the context of 'a deal', but for the purposes of this piece the 'no-deal' position will be explored.

The no-deal position can be broadly broken down into three parts and consequences for:

- EU citizens currently resident in the UK before exit day
- EU citizens looking to enter the UK after exit day but before 31 December 2020, and
- those EU citizens looking to enter the UK after 31 December 2020

## What would happen to EU citizens currently resident in the UK before exit day?

Currently, EU citizens living in the UK benefit from what is commonly known as a right to 'freedom of movement'. This derives from EU Directive 2004/38/EC that essentially gives EU citizens the right to live and work in the UK. It is estimated that there are well in excess of 3.6 million EU citizens living in the UK who benefit from these rights. These rights are set out in a series of domestic

pieces of legislation that implement EU law. Should the UK leave without a deal EU law will no longer apply, and these rights will come to an end.

The European Union (Withdrawal) Act 2018 will 'copy and paste' the domestic legislation. This will ensure that EU citizens living in the UK before exit day are not resident unlawfully in the UK after exit day. The UK government has stated that there will be changes to this copied law in the run up to 31 December 2020. It is understood that EU citizens will be able to live, work, rent, seek free help from the NHS etc, as before until this date.

The government has introduced Immigration Rules which eligible EU citizens can use to apply for status to remain in the UK. Applications can be lodged via the EU Settlement Scheme (EUSS). Those EU citizens resident in the UK prior to exit day must apply for status via the EUSS by 31 December 2020. Those with 'good reasons' can apply after this date, however, this has yet to be defined.

The eligibility criteria for EU citizens to acquire status inside the UK is broadly in three parts:

- evidence of nationality/identity
- evidence of continuous residence inside the UK, and
- satisfying certain suitability criteria (not being subject to deportation and other public policy points)

Depending on how long an EU citizen has been resident in the UK will dictate the type of status they are granted. Those continuously resident in the UK less than five years will be awarded five years leave to remain— 'pre-settled status'. Those who have been resident in the UK for at least five years will be granted indefinite leave to remain— 'settled status'. Those with indefinite leave to remain (ILR) via the EUSS, unlike other types of ILR under the rules, are allowed an absence from the UK of up to five years instead of the usual two (four years for Swiss nationals).

The EUSS introduces a new way to apply for status with the Home Office. Applicants can use an app (currently only available via Android phones) to scan their relevant ID and then proceed to an automated online check of their residence in the UK. If the applicant provides a National Insurance number, the system checks HMRC and the Department for Work and Pensions records of the applicant during the online process. If there are gaps/missing information, the applicant can provide evidence by scanning and uploading it to the Home Office. Applications to the Home Office are free.

Certain family members (including EU and non-EU citizens) will be able to apply to remain/join their eligible EU citizen. Most family members will be able to apply for status via the EUSS to join the EU citizen in the UK until the end of March 2022. Thereafter they will need to apply using other routes of the Immigration Rules. Family members will need to demonstrate their relation to the eligible EU citizen in addition to the above criteria to qualify.

The confirmation/proof of grant of indefinite/leave to remain is provided via an online tool. The recipient of the status is required to curate it via further online tools. Those with five years' leave to remain can apply for indefinite leave to remain once they have accrued the necessary continuous residence in the UK.

The criteria and process would be broadly the same if the current Withdrawal Agreement were adopted but with key differences in relation to family reunion and appeal rights and oversight functions from the Court of Justice and an independent monitoring authority. Decisions via the EUSS come with no right of appeal to a tribunal in the event of no-deal. Some of these restrictions of rights do not apply to EFTA and Swiss nationals because the UK has established separate international agreements with these countries which mirror the Withdrawal Agreement which apply in the event of no deal.

**What would happen to new EU citizens looking to enter the UK after exit day?**

Those EU citizens that cannot benefit from or have yet to apply through the EUSS can continue to enter the UK freely post exit date. It is understood that the retained EU law mentioned above will permit this. The UK has recently released a new policy paper which sets out plans for immigration during the period between 31 October 2019, 11pm and 31 December 2020.

Those EU citizens with certain criminal convictions and meeting certain public policy criteria will not be able to enter freely during this period. It is not clear how the government will establish those with convictions and prevent them from entering. It is understood that the UK intends to amend the copied legislation mentioned above to allow for a form of free movement until the end of 31 December 2020.

EU citizens who arrive during the period of 31 October 2019 and 31 December 2020 but wish to remain beyond 31 December 2020 can apply for three years' temporary leave to remain—'Euro TLR'. This status will allow for recipients to work inside the UK following 31 December 2020 for however long their three-year leave to remain lasts. The government's policy is not clear from which date the leave to remain will run. The eligibility criteria will be based on the applicant having EU nationality or being a certain family member of the EU national, residence in the UK prior to 31 December 2020 and not possessing a criminal record/engaging specific public policy issues.

The policy paper sets out that a similar online process to that set out above will be introduced for those wishing to acquire Euro TLR. The status is non-extendable. Rules have yet to be put in place detailing how this policy will be implemented, which limits the commentary which can be provided at this stage. The application will be free.

The policy paper sets out that there will be no changes to the structure of the right to work/rent checks and other hostile environment features during this period. After 31 December 2020, those EU citizens who arrived during the period 31 October 2019 to 31 December 2020 but who have not applied for a new immigration status by 31 December 2020 will be unlawfully in the UK and subject to removal. The paper does not explicitly state whether this position applies to EU citizens resident in the UK before exit day. It is difficult to see how it will not.

The government intends to have a new immigration system in place by 31 December 2020. Little is known about the new scheme or what it will replace in the current system. Prior to the current government, proposals were understood to be based around skills and a minimum salary and maintaining the current 'employer lead' system, but this looks to be replaced by an 'Australian style' points-based system. The Migration Advisory Committee has been commissioned to quickly review and provide guidance by January 2020.

**What steps can practitioners take to prepare for a no-deal situation?**

EU citizens and their family members should establish what status they can acquire to remain in the UK after it exits from the EU. Practitioners in the immigration field should do what they can to best achieve this. Some EU citizens may already have alternative status to remain and others may wish to identify an alternative route such as naturalisation. Most EU citizens will need to apply for status via the EUSS and should do so as soon as possible.

It is particularly recommended that practitioners ensure that EU citizens get the status they are entitled to. There have been reports of EU citizens getting pre-settled status instead of settled status. Practitioners should make EU citizens aware that as well as pre-settled status being a lesser status, the rules on continuous residence mean that an absence of more than six months will result in an ineligibility to obtain settled status at a later date.

The position for those EU citizens entering the UK after exit date and eligible for Euro TLR is vague because there is only a policy paper setting out the government's intentions. Without the rules or a running scheme, the benefits of applying as soon as possible or waiting until closer to 31 December 2020 are uncertain.

Those practitioners advising employers should make sure that they are aware of the different status types and when they will apply. Right to work checks will be satisfied as they are now for EU citizens with proof of nationality. The position after 31 December 2020 is yet to be fully established.

# No-deal Brexit and competition waivers—an in-depth look

One of the industries believed to suffer the most in a no-deal Brexit scenario would be the UK food industry. This is reflected in the fact that the Food and Drink Federation, who represent the UK food industry, have called for a 'competition waiver' in the case of a no-deal Brexit. Jay Modrall, partner at Norton Rose Fulbright, gives an in-depth look into competition waivers in a no-deal Brexit scenario and highlights the 'case-by-case' nature of the EU's stance on competition waivers.

**What is a competition waiver? How would it affect the food industry in the event of a no-deal Brexit and is it a good solution?**

Because many farmers are small businesses and disadvantaged vis-à-vis larger companies down the value chain, such as wholesalers and supermarkets, farmers may need to cooperate in ways that might be prohibited under the normal antitrust rules, for instance in relation to pricing and joint marketing. EU law has provided such derogations for many years, though they continue to be controversial. The most popular derogation in recent years has allowed for so-called value-sharing agreements, under which farmers can include risk-sharing provisions in their customer agreements. The derogation for value-sharing agreements initially proved popular in the sugar sector and was subsequently extended to other sectors.

Whether special action is needed to continue or expand the traditional EU agricultural derogations in the UK in the event of a no-deal Brexit will depend largely on how these rules are treated in the UK's transitional legal regime and the special challenges posed by a no-deal Brexit. If the UK's incorporation of EU law may include the EU's current competition waivers for agriculture, the existing waivers would continue to be available. Even so, further action may be required to expand those waivers in a no-deal Brexit, for instance by expanding the scope of the waivers to additional products and/or to cover cooperation with businesses in other parts of the industry.

**How likely is it that the competition waiver will be granted? Have there been similar cases in the past?**

In the EU, competition waivers may be granted on a case-by-case basis or apply automatically to categories of agreements or actions meeting defined criteria. A recent EU study revealed relatively few cases in which case-by-case waivers have been granted. As with other areas of antitrust, however, the EU has been moving towards a 'self-assessment' approach, which requires companies to self-assess whether their proposed actions benefit from a waiver. Given the costs and risk of delay in the case-by-case approach, I would expect any UK competition waivers to follow the self-assessment approach.

**Why would the food industry in particular be affected by no-deal Brexit? How different would the impact be compared to if there was a deal?**

As mentioned, the food industry is characterised by an unusual level of fragmentation at the producer level, because of the prevalence of small farms in Europe. This feature is the traditional justification for competition waivers in the food industry. Of course, this feature of the food industry does not depend on Brexit. Whether there is a deal (and the terms of the deal) may affect how Brexit impacts the UK agricultural sector and whether special action is needed to continue or even expand traditional EU competition waivers.

**If there was no competition waiver how would this translate into food prices for consumers?**

The relation between competition waivers and food prices is unclear. Since competition waivers are normally intended to help increase farmers' bargaining power, competition waivers may lead to increased selling prices for farmers. But that does not necessarily mean that consumer prices would also increase. That may be especially true if the UK contemplates new types of waivers, for instance to allow for cooperation across the value chain or across borders.

**Are there legal challenges surrounding the ability to grant a competition waiver?**

As mentioned, the EU system provides for a combination of case-by-case waivers and self-assessment. A recent Commission study showed that farmers have not made extensive use of case-by-case waivers, which can involve delays and legal costs. A self-assessment system would likely be more useful, but the rules setting up the system need to be clear and practical to minimise legal challenges.

**How likely is it that other sectors will call for a competition waiver?**

It is impossible to predict whether Brexit will prompt other sectors to request competition waivers. In the EU system, the agricultural derogations are unique and based on the key role of the EU's Common Agricultural Policy. The strain of a no-deal Brexit may prompt other sectors to request competition waivers, but UK law would need to provide a new basis for such waivers, which would be controversial and could raise issues under the new UK State aid regime.

**How would a competition waiver affect supply chain contracts?**

Under EU law, competition waivers benefit only farmers and groups such as farmers' cooperatives (known in EU-speak as purchasing organisations, associations of purchasing organisations and inter-branch organisations), so there is little scope to apply competition waivers down the value chain. An exception is the derogation for so-called value-sharing agreements. If the UK is considering how to expand on the existing EU framework to help the UK food sector deal with a no-deal Brexit, the government may consider building on the concept of value-sharing agreements to include actors at different levels of the industry.

# No-deal Brexit—effects on the insurance sector

Though already in the business of preparing for the worst, the insurance sector is one of many that now finds itself looking ahead to challenges if the UK leaves the EU without a deal in place. Carol-Ann Burton, partner and Rita Kato, associate, both at HFW, assess the damage.

**How will no-deal Brexit affect European based insurers and insurance brokers doing business in the UK?**

The situation differs for those insurers that wish to continue writing new business in the UK as they currently do, and those exiting with a wish simply to service business as it runs off.

Those who want to stay put and continue writing new business are required to register under the Temporary Permissions Regime (TPR), which is in itself a useful tool for any entity wanting to keep its options open. Registration under the TPR is being encouraged by the regulators, largely because it gives firms breathing space without an obligation to submit an application for full UK authorisation. As such, it leaves open the option of an exit but nevertheless buys some time to continue business as usual while the full political and legal issues are addressed. If the firm opts to remain in the UK, it would be required to obtain full authorisation (or authorisation as a third country branch) while in the TPR. The TPR should reassure EU firms that had been passporting into the UK that the regulator is adopting a proportionate approach and will apply a reasonable timeframe concerning the application of UK rules.

For those leaving the UK—and however much we might not want that, it remains the reality—draft rules allow EU firms to continue servicing those policies written prior to Brexit for up to 15 years post Brexit. This is a pragmatic UK policy that protects policyholders in the UK. Firms currently passporting into the UK on a services basis will be deemed to be exempt from the general prohibition against carrying out regulated activities without authorisation. For those passporting into the UK on an establishment basis, they will be deemed to have full UK authorisation to continue servicing existing policies and paying claims but will consequently be subject to a limited application of UK rules. The regulators have suggested amendments to existing rules that will need to be made to allow a supervised run-off for these firms.

From a European perspective, it has so far proven safe to assume that the approach of UK regulators is a pragmatic approach to a complex situation, but firms must still identify which is the right solution for them and put in place the processes to facilitate their business plan post Brexit.

As an underlying issue, we are acutely aware that firms do not always passport on the correct services or establishment basis. For example, there is a common presumption that only by opening a corporate branch in the UK would a company assume an establishment basis for passporting purposes. This is not the case, and any company with, for example, an agent acting as its behalf in the UK may in fact be operating in the UK on an establishment basis. EU firms should be aware of this, with the same applying to UK firms going the other way.

**Has the recent spate of Part VII to the Financial Services and Markets Act 2000 (FSMA 2000) transfers by UK based insurers ensured that they will be unaffected by a no-deal Brexit?**

The short answer is ‘yes’ but the reality is not so straightforward. The decision by a number of firms to

commence FSMA 2000, Pt VII transfers in anticipation of a 'hard' Brexit was a conservative decision but one that was expensive and time-consuming given the need to transfer existing books of European business with ongoing claims to be serviced. For those firms that decided not to apply for a licence in a particular EU jurisdiction and not to effect a FSMA 2000, Pt VII transfer, the risk, post-Brexit, is that a book of business that was written perfectly legally on a passporting basis, suddenly becomes unserviceable without a licence. A FSMA 2000, Pt VII transfer resolves this concern by transferring the business to an authorised entity inside the EU.

Irrespective of the FSMA 2000, Pt VII option available to UK insurers, a number of jurisdictions have indicated that transitional relief would be made available to UK insurers to continue servicing existing business. This is not surprising, but it is noteworthy that each jurisdiction has taken a slightly different approach, with no uniform rules on European authorisation—a political matter that is as much as anything due to friction in the overall Brexit process. The European Insurance and Occupational Pensions Authority (EIOPA) has meanwhile published a recommendation to EU regulatory authorities that any portfolio transfers from UK into the EU, started before date of Brexit, should be allowed to be finalised.

**Are there any alternative transfer mechanisms?**

There is currently no mechanism for commencing transfers of business between EU and UK entities after the date on which the UK leaves the EU. This means that FSMA 2000, Pt VII transfers will only be able to take place between UK companies.

The situation as a whole is one that will likely create new forms of innovation. A few years ago we saw an Irish—Bermuda intragroup transfer of business, drawing on a mechanism available under the Companies Act 2006—namely a scheme of arrangement—which ultimately achieved the same effect as a FSMA 2000, Pt VII transfer. This is indicative of the fact that there are other mechanisms that might open up in and between some jurisdictions. At this stage, all this remains purely speculative.

**How will no-deal Brexit affect third country insurance undertakings engaged in UK cross border insurance business?**

The above scenarios outline the situation that will be faced by UK and EU insurers. For US insurers, the US-UK covered agreement has already been signed, replicating the EU-US agreement and ensuring—as with the Swiss agreement—that the same terms are in place. Other countries with which we had EU-level arrangements are likely to see deals replicated and generally providing equivalence with current terms.

**Might UK-based third country insurance undertakings be sleepwalking into a no-deal scenario in which they are unable to carry on business on exit day?**

If an insurance undertaking has a non-European headquarters and is authorised in the UK, then other arrangements must be made in Europe to access new business there. These insurers will find themselves in the same position as UK insurers relying on the local jurisdiction's transitional rules to enable them to continue servicing assisting business.

**How does recent guidance from EIOPA on the implications of a no-deal Brexit bode for business continuity for UK based insurance undertakings? Should they be concerned?**

The guidance from EIOPA (which is not legally binding) is essentially to minimise detriment to policyholders, and this is why transitional relief is being given—to ensure policyholders get paid. EIOPA has communicated that management of cross-border business should be conducted to minimise detriment to policyholders and that this is EIOPA's general objective.

Despite this, it is interesting to note variations arising between the different EU jurisdictions. Ireland has provided relief, but only for three years, ensuring that if a run-off is longer than that period then an alternative solution is needed. Other EU jurisdictions have also taken different approaches regarding registration requirements for firms seeking to rely on transitional relief and requirements regarding notifications to policyholders. For countries passporting into only a few jurisdictions this may not be so burdensome, but for larger insurers with multiple jurisdictions to consider, it is a substantial compliance exercise.

**What about the legacy sector in London? Are there any particular concerns in respect of long-tail legacy portfolios?**

Insurers in this situation face the same circumstances as everyone else concerned with the ability to run-off existing business. The challenge here is where those legacy specialists are run-off consolidators that commonly transfer EU books of business via a FSMA 2000, Pt VII transfer into a principal underwriting entity in the UK that services the policy on a passporting basis. Ultimately a presence on the ground in the EU is likely to be required to facilitate ongoing business. This of course means a move of business out of the UK. It is a hard reality, but reality nonetheless.

**What steps, if any should insurance practitioners and their (re)insurer clients be taking?**

The market has until now been focussed very closely on today and tomorrow—this has been an understandable

due to the churn, uncertainty and crisis management that Brexit brings. What we have not so far seen is the five-year view of what might arise in the aftermath of an exit without a deal. The example of the legacy sector with an entity in the UK is a good one. Where the run-off sector is seeing opportunities and expansion in Europe, the business may not come back into the UK.

The mid-term scenario is one in which we are likely to see intragroup restructurings that have a capital and solvency impact on entities in the market. Rationalisation and optimisation of capital will become more of an issue as this process takes place and business as usual returns. Once compliance is in place, firms will seek to put themselves in the best position possible, including considering how to streamline operations.

Politically, the final concern rests on how negotiations proceed and how we exit. Nobody really knows what sort of a line the European regulators will take towards the UK in the event of a hard exit. In recent years, Ireland has—for example—already made strict substance requirements for companies seeking to do business in Ireland, so that firms must have individuals that are in a senior position resident in Ireland, and not simply have a brass plate or a phone line in Ireland. A strong line from the European regulators on substance requirements may require a movement of leadership out of London is possible and this could result in a number of big challenges for the UK and the City.

# No-deal Brexit—potential effects on English arbitration

As the UK faces the prospect of a no-deal Brexit, Oliver Marsden, partner at Freshfields, reflects on its likely impact on English arbitration law.

**Brexit may have a limited impact on English arbitration law (deal or no deal). How, if at all, would a no-deal scenario impact English arbitration?**

That is correct—deal or no deal, Brexit will have very little impact on English arbitration law:

- the Arbitration Act 1996 (AA 1996), which sets out the legal framework for all arbitrations seated in London, will be unaffected by Brexit, and
- arbitral awards rendered in London-seated arbitrations will continue to be enforceable in all EU Member States and vice versa under the New York Convention, which is also unaffected by Brexit

The post-Brexit outlook for English court litigation is less clear. There is currently a smooth framework for the enforcement of English judgments within the EU and vice versa pursuant to Regulation (EU) 1215/2012 (Brussels I (recast)), but in a no-deal scenario, Brussels I (recast) will cease to apply to the UK from 1 November 2019, subject to transitional arrangements, and it is not clear what will replace it. The UK and the EU could ultimately strike an agreement to keep the UK within the Brussels I (recast) regime, but there are no signs of any such agreement at present. Alternatively, the UK could seek to re-accede to the Lugano Convention post-Brexit, which also provides a robust framework for the enforcement of judgments across the EU (and Switzerland, Norway and Iceland), but this would require the consent of all contracting states.

The UK has acceded to the Hague Convention on Choice of Court Agreements unilaterally, although this is currently suspended until exit day. However, the Hague Convention is limited in scope to proceedings under contracts with exclusive jurisdiction clauses (sole option clauses and non-exclusive jurisdiction clauses are not covered), there is debate as to whether it will apply to agreements entered into prior to exit day and it does not apply to orders for interim relief. Where there are these gaps in coverage, parties will be reliant on local law in the relevant EU Member State, which may mean more hurdles and potential roadblocks in certain jurisdictions. There are indications that arbitration has been growing in popularity since the Brexit vote as parties seek to avoid the Brexit-related uncertainty affecting court litigation.

There is only one aspect of English arbitration law that may change as a result of Brexit, and it would be a positive change. In light of the Court of Justice's decision in *Allianz SpA and Generali Assicurazioni Generali SpA v West Tankers Inc*, Case C-185/07, the English courts are currently prevented from issuing anti-suit injunctions to restrain court proceedings in EU Member States brought in breach of an arbitration agreement (some suggested that *West Tankers* had been superseded by Brussels I (recast), recital 12, but the High Court put paid to that theory in *Nori Holdings Ltd & Ors v Public Joint-Stock Company 'Bank Otkritie Financial Corporation'* [2018] EWHC 1343 (Comm), [2018] 2 All ER (Comm) 1009). Post-Brexit, *West Tankers* will technically be brought into English law pursuant to the European Union (Withdrawal) Act 2018 (EU(W)A 2018), but the English courts will no longer be bound by it and are likely to overrule it. Going forward, the renewed availability of anti-suit injunctions from the English courts may be an attractive feature for parties weighing in favour of a London seat rather than a seat in an EU Member State. A party to an arbitration seated in an EU Member State could in theory seek to bypass *West Tankers* by obtaining an anti-suit injunction from the tribunal in the form of an award, which could then be enforced under the New York Convention (this was confirmed by the Court of Justice in *Gazprom OAO v Lietuvos Respublika*, Case C-536/13). However, an anti-suit injunction is usually required on an urgent basis before the tribunal is constituted, and an emergency arbitrator appointed

pending constitution cannot grant relief in the form of an award under certain institutional rules.

**Brexit will not impact the UK's position vis-a-vis the New York Convention and commercial arbitration awards will continue to be enforced in the UK and the EU in a no-deal scenario. How may a no-deal Brexit impact the enforcement within the EU of worldwide freezing orders issued by the English courts in support of arbitration proceedings (and/or arbitral awards)?**

In a no-deal scenario, the future framework for enforcing English worldwide freezing orders in EU Member States is uncertain. If the UK strikes an agreement with the EU to stay within the Brussels I (recast) regime or secures the consents required to re-accede to the Lugano Convention, parties will continue to enjoy a robust framework for enforcing such orders within the EU post-Brexit. If, however, the only protection in place post-Brexit is the Hague Choice of Court Convention, which (as noted above) does not cover orders for interim relief, parties will be reliant on local law in the relevant EU Member State.

**In a no-deal scenario, will the English courts be bound to refuse to enforce or set aside an arbitral award that is contrary to EU law as EU public policy will no longer form part of English public policy (Eco Swiss v Benetton)?**

Like *West Tankers*, the Court of Justice's decision in *Eco Swiss China Time Ltd v Benetton International NV*, Case C-16/97 will technically be brought into English law pursuant to EU(W)A 2018 but is likely to be overruled in due course. In *Eco Swiss*, the Court of Justice held that where a tribunal's award contravened fundamental provisions of EU law, an EU Member State court was required to grant an application to set aside the award on public policy grounds. Post-Brexit, it seems unlikely that the English courts will accord special status to particular principles of EU law that are retained within English law such that contravention of those principles is so serious as to engage English public policy.

**Howzwill a no-deal Brexit affect London as a leading seat of arbitration? Essentially, how de-stabilising will a no-deal Brexit be?**

For the reasons discussed above, Brexit should lead to an increase in the use of arbitration and in London's popularity as a seat of arbitration. Although a no-deal Brexit may have an adverse economic impact on the UK, the features of London that make it attractive as a seat of arbitration will remain unchanged:

- robust arbitration legislation in the form of AA 1996
- an excellent judiciary with a 'maximum support, minimum inference' policy with respect to arbitration proceedings
- a community of top-rate legal counsel and high-quality specialist hearing venues

Depending on the UK's immigration policy post-Brexit, EU lawyers could be subject to more burdensome administrative requirements when flying in and out for hearings (eg a work visa), but that alone should not impact the overall draw of London as a place to arbitrate.

**How would a no-deal Brexit impact investment treaty arbitration? How would this impact the UK's January 2019 declaration regarding the impact of Achmea? What do you anticipate will be the UK's policy as to the use of arbitration for the resolution of investor-state dispute resolution (ISDS)?**

The UK is currently party to 12 intra-EU bilateral investment treaties (BITs). Although the UK was one of 22 EU governments which declared in January 2019 that they would terminate their intra-EU BITs in light of the Court of Justice's decision in *Slovak Republic v Achmea*, Case C 284/16, post-Brexit the UK's declaration will fall away. Since the UK's BITs will no longer be classified as intra-EU, they will be immune from the jurisdictional and enforcement challenges raised by *Achmea*. This will provide some welcome certainty for UK-based investors with pending claims against EU Member States. The UK may also become an attractive jurisdiction through which to structure investments into the EU, enabling parties to avoid the impact of *Achmea* and continue to enjoy BIT protection.

As regards the UK government's policy on the use of arbitration for ISDS under post-Brexit trade agreements, the House of Commons Select Committee on International Trade published a report in July 2019 which called on the government to clarify its position in this regard and carefully consider and evaluate different approaches, including an investment court system. The report also favours the inclusion of state-friendly provisions in any trade agreements, following the precedent set by the new Dutch Model BIT, including investor obligations, provision for state counterclaims, and ensuring alignment with UK government policies regarding development, climate issues and human rights.

**What steps, if any, should lawyers and their clients be taking now?**

During this period of uncertainty, it is more important than ever that lawyers work closely with their clients to ensure that:

- they choose the right dispute resolution mechanism for their contracts, anticipating the jurisdiction(s) where they may need to enforce and considering whether court litigation or arbitration will offer better protection, having regard to the possible impact of Brexit on the applicable legal framework, and
- they secure optimal treaty protection for their investments

# No-deal Brexit—potential effects on environmental law

Simon Tilling, partner at Burges Salmon LLP and Begonia Filgueira, chair of the Brexit Task Force at the United Kingdom Environmental Law Association (UKELA) and head of environment at Foot Anstey LLP, discuss the pressing questions on environmental law practitioners' minds of a no-deal Brexit.

**What in your view would be the most significant effects on environmental law of a no-deal Brexit?**

**Begonia Filgueira (BF)**: In the short term, there should not be any major impact on environmental law as we have adopted all EU-derived legislation as domestic law following the European Union (Withdrawal) Act 2018. However, we would lose the scrutinising function of the European Commission and the Department for Environment, Food & Rural Affairs will need to have a shadow body running until relevant legislation is passed to create the Office for Environmental Protection.

In the medium and long term, there is uncertainty. There is a danger of diverging levels of environmental protection which could be driven by trade agreements with non-EU countries and which could lessen the chances of a trade partnership with the EU, our closest trading partner. The UK could choose to increase levels of environmental protection or the new Prime Minister could choose not to follow through with the new Environment Bill.

**Are there any areas of UK environmental law upon which a no-deal Brexit would have a particularly significant effect?**

**Simon Tilling (ST)**: One of the most challenging issues for environmental law arising from Brexit concerns chemicals regulation. The EU's flagship law to control chemicals, Regulation (EC) No 1907/2006 on the Registration, Evaluation, Authorisation and Restriction of Chemicals (REACH) is a gargantuan law that shifts the burden of identifying hazards onto industry through a system of registration and submission of data to a central repository held by the European Chemicals Agency (ECHA). The ECHA then works with government experts in the (currently) 28 Member States to evaluate the data and decide which chemicals require further control, such as restricting their use in certain products or prohibiting the handling of the chemical other than in accordance with the strict terms of a European Commission granted authorisation. It is one of the most complicated laws ever to pass through the EU legislature and required a decade to be phased in.

**Are there any EU Exit Regulations which have a particularly significant effect on UK environmental law?**

**ST:** In a no-deal scenario, the UK has to mirror REACH on Exit day. There are EU Exit Regulations (the REACH etc (Amendment etc) (EU Exit) Regulations 2019, SI 2019/758 and the REACH etc (Amendment etc) (EU Exit) (No 2) Regulations 2019, SI 2019/858) in place to do so, but they have been subject to strong criticism. The House of Lords passed a motion of regret that the new rules did not match the government's stated ambition on chemicals regulation, and there are a number of areas where there are gaps between the two regimes.

Above all, mirroring REACH is not simply about words in the statute book, the machinery of REACH was a complex

blend of a well-resourced ECHA, competent authorities in all 28 Member States and the European Commission, supported by a framework of private consultants. The job of evaluation of the data—which is at the heart of REACH—necessitated this resource. The real question is how (and indeed if) the UK is going to replicate this work and where the money would come from to do so.

**BF:** Exit-related legislation was passed so quickly that no one has really had an opportunity to scrutinise it properly. UKELA and the UKELA Brexit Task Force are hoping to start a project on post-legislative scrutiny of EU Exit Regulations imminently so we should know more by Autumn 2019.

**How can environmental law practitioners and their clients prepare for a no-deal Brexit given the current state of uncertainty?**

**ST:** It is undoubtedly difficult for clients and their advisers, but there are steps that can be taken. For example, we have been working with clients on their REACH registration strategies to ensure continued access to both the EU Single Market and the UK market after a v Brexit. However, it is true to say that, for many, the strategy is now to wait and see what happens.

**BF:** The promise is that we should have an Environment Bill Part II, in Autumn 2019 and this Bill can potentially represent a new era for environmental law in the UK.

# No-deal Brexit—potential effects on real estate transactions

What will be the impact of a no-deal Brexit on real estate finance transactions? Mark Lewis, head of property finance at Browne Jacobson, examines the implications.

**What impact would a no-deal Brexit have on the real estate finance market?**

The residential and commercial markets are already experiencing a slowdown with the threat of a recession also hanging over the economy. In particular, there is a significant slowdown in development and investment, and it is anticipated these sectors will come to a grinding halt for a period of time should a no-deal Brexit take place.

Contrast this with the strongly performing shed sector which I expect will continue to perform strongly in the short to medium term due to the need to stock pile to replace just-in-time supply chains. Funding options are not expected to close in this sector in the short term.

The challenger banks are expected to be busier with a no-deal Brexit. The market commentators are predicting a fall in property values for both residential and commercial property. A fall in property values will test current loan to value (LTV) covenants and investors approaching a breach of their LTV covenants will likely need to seek alternative funding with higher LTV covenants which will be at higher cost.

I would expect Homes England to fill any funding gaps for housing developers if there is a squeeze or withdrawal of development finance for housing.

**What preparations is the real estate finance market making for a no-deal Brexit?**

We have seen the small to medium enterprise (SME) sector rush to secure historically cheap funding from high street banks. This area of the economy has been resilient to date and it seems SMEs are taking a very much business as usual approach. We see lenders continuing to have an appetite to support the SME sector.

As there is such a lack of clarity on what the post-Brexit world will look like we haven't seen our clients make radical preparations. We have seen larger corporates and investment funds investigate their funding options and then sit on their options as they wait for clarity on Brexit. I'm sure that the larger investors are waiting to see what value will be in the market after October 2019 and it may be that they will need higher equity stakes post-Brexit.

One difference between now and the 2008 financial crash is that the banks are far better capitalised. This will give the banks flexibility to react to Brexit once the dust settles.

**Are there any additional clauses, or other documentary changes, that should be made in preparation for a no-deal Brexit?**

We have experience of using a Brexit clause in property contracts. This gave our clients the opportunity to terminate property contracts which we first saw in 2016 in the event the leave campaign won the referendum. We have seen this more in the investment sector as opposed to the development sector. We have seen developers not commencing schemes rather than start a scheme where any party requires a Brexit clause.

**Is the prospect of a no-deal Brexit changing the way deals are structured eg different mix of lending or borrower entities or loan tranches?**

We haven't seen anything specific other than a slowdown in the volume of transactions.

I feel possibly lenders will look to structure deals with more of an equity return (eg exit fees, equity participation, etc) if, as a result of a no-deal Brexit, the transactions are perceived to be more risky.

In terms of pricing, it is unlikely this will move significantly as we see liquidity in the market as still being strong.

**Are there any other issues, legal or practical, that real estate finance lawyers and market participants should be aware of?**

Whatever type of Brexit takes place I expect that the Bank of England will keep the interest rate at the current level or reduce it. This will give investors and developers breathing space during an expected difficult short term post-Brexit period without suffering a significant shock and avoiding the need for investors to participate in a fire sale of their assets. It will also allow developers to proceed with schemes that they have been holding back on starting provided that their purchasers or tenants remain committed to those schemes.

I would also expect to see a rise in bridging finance, either in the traditional sense or new banking products coming to the market, to help the real estate market ride out any short term turbulence in the market in the event of a no-deal Brexit.

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