Brexit Q&A

Commercial law

Q1. Will UK businesses be able to transfer personal data to and from the EU (from e.g. EU customers or group companies) after Brexit in the same way as they had before?

Currently the ultimate position is unclear. Assuming that the draft Withdrawal Agreement (**DWA**) is ratified by the UK, the status quo will prevail until the end of the Transitional Period (i.e. 31 December 2020). Thereafter, the DWA also has the effect of requiring that personal data transferred to the UK prior to the end of the Transitional Period will continue to be protected as it had been prior to the end of the Transitional Period.

The DWA does not provide that the UK will be a trusted third country after the Transitional Period and whether or not the UK will be granted adequacy status allowing for frictionless transfer of personal data after the Transitional Period.

A hard no-deal Brexit on 29 March 2019 will have an immediate effect on the transfer of personal data to and from the EU. The UK will become a third country without the benefit of an adequacy decision. This will mean that businesses will need to put in place measures to facilitate the transfer of personal data from the EU to the UK. The most familiar of these measures is the use of EU standard contractual clauses.

A number of difficult situations for UK businesses processing data about EU citizens may arise after the DWA Transitional Period or after a hard no-deal Brexit, for instance:

- they may find themselves doubly regulated and potentially subject to being fined twice for the same event or having to report the same event to more than one regulator;
- they may also need to think about appointing a representative in the EU pursuant to Article 27 of GDPR;
- where they have entered into binding corporate rules using the UK ICO as the relevant data protection authority, they may need to consider having those blessed again by a data protection authority of a remaining Member State.

Q2. Will Brexit be regarded as a Force Majeure event?

It's unlikely - though it will depend closely on the wording of any Force Majeure ("**FM**") clause in a particular contract. The *usual* construction of an FM clause excuses a party from liability for failing to perform an obligation in a contract if the cause of the failure was not within the reasonable control of the party, the cause was not reasonably foreseeable and the obligation has become impossible to perform.

So whilst we would not normally expect Brexit of itself to constitute an event of FM, some of the effects of Brexit might give rise to an event of FM. For example, if it becomes illegal to perform the contract or key aspects of it after Brexit or if there is an acute shortage of labour following Brexit. Financial hardship is not usually sufficient and timing can also be an issue – absent specific language, it would be tough to argue that Brexit was not reasonably foreseeable in respect of contracts entered in after June 2016.

Other contractual mechanisms may give rise to relief, such as through risk sharing of interest rate or currency fluctuations, or more generally where the effects of Brexit give rise to a "material adverse circumstance" clause (known as "MAC" clauses) being triggered.

The doctrine of frustration may also come into play and it might allow one party or other to terminate the contract. Poignantly, the European Medicines Agency, which is moving from London to the continent as a result of Brexit, wants to escape its long term Canary Wharf lease and is arguing that its lease is frustrated – it's landlord disagrees (https://uk.reuters.com/article/uk-britain-eu-medicines-lease/eu-medicines-agency-faces-court-fight-over-660-million-rent-bill-idUKKBN1KG1VJ).

Whether, and how, Brexit might affect a particular commercial arrangement will be highly specific to the arrangement itself. Businesses would do well to examine any relevant arrangements in detail and come up with an appropriate plan to deal with the likely effects of Brexit.

Q3. What shall we put into commercial contracts to protect our position in case of a hard Brexit?

Firstly, it's important to mention that Brexit will not materially alter English commercial contract law.

What will work in one contract may not work in another. There are, however, some common types of issues that should be addressed. Each of these ought to be tailored to the relevant commercial circumstances and the likely impact of Brexit on those circumstances. As a guide:

- **Territories**: consider whether a reference to the EU should include members at the time the contract is entered or membership at any given time in the future and where that leaves the UK;
- **References to EU Law**: should these include UK laws or should those be dealt with separately;
- **Changes in Law**: it would be prudent to document how the parties might deal with the consequences of any relevant change in law (particularly in a highly regulated sector, such as financial services);
- **Force Majeure**: will a party be excused its obligations in whole or in part and in what circumstances;
- **Risk Sharing Mechanisms**: perhaps the parties might agree to share the pain or gain that arises from changes due to Brexit (such as currency fluctuations);
- **Delays**: customs clearances are expected to take longer following Brexit, as might navigating the roads in and out of the ports, should the carrier be given some relief from the these delays or might the other party require liquidated damages should the delays take longer than it might like?
- **Tax**: which party will bear any increase in taxes, particularly VAT or tariffs?
- **Novation/Assignment**: will a party be permitted to assign a contract to a related party in the EU or the UK, as appropriate, if it needs to establish a new entity as result of Brexit;
- **Disputes**:
    - **Jurisdiction:** be clear about which courts the parties are comfortable with hearing any dispute and what should happen if multiple courts end up having jurisdiction;
    - **Enforcement:** easy cross-border enforcement of judgments may cease after Brexit, would it be appropriate to use arbitration instead as enforcement of arbitral awards under the New York Convention will not change and those awards will continue to benefit from a relatively easy enforcement procedure;
- **IP / other rights**: clearly state that if a reference to a European IP right is intended to include any registrations in the UK that derive from them;
- **Insolvency**: ensure that the contract deals appropriately with one or other of the parties becoming insolvent as a result of Brexit.

Q4. What will happen to European patents and European TMs owned by British businesses after Brexit?

These rights will continue to be valid but won't be directly enforceable within the UK.

A hard no-deal Brexit will see the UK protection of umbrella EU rights disappear and businesses may have to apply to reregister those rights in the UK. This may prove difficult if the original EU right was applied for long enough ago that the window given for international applications has closed.

Under the WDA, the UK has agreed that for EU umbrella IP rights it will grant an equivalent right in the UK without any need for re-examination – in other words protection will continue in the UK. The WDA does not specify whether or not new fees will be changed by the UK IPO (Intellectual Property Office).

Q5. How will judgments be enforced cross-border after Brexit?

Under the Brussels Recast Regulation judgments from one EU court are relatively simple to enforce in other Member States. These regulations will cease to apply following a hard no-deal Brexit. As a result, businesses seeking to enforce UK judgments in the remaining Member States will have to abide by the relevant Member States own rules for the registration and enforcement of foreign judgments. The reverse will apply to EU judgments sought to be enforced in the UK. This could give rise to the resurgence of forum shopping between the UK and remaining Member Status.

The DWA will preserve the status quo for any court action commenced before the end of the Transition Period.

Parties that may be left in this position could consider requiring that disputes be dealt with by arbitration. The rules for the enforcement of arbitral awards stem from a non-EU treaty (the New York Convention) which will not be affected by Brexit. Parties could also consider inserting clauses into their contracts limiting their rights to object to enforcement of UK judgments in the EU after Brexit, or vice-a-versa.

Q6. Benefits of AEO status after Brexit

AEO (authorised economic agent) is an EU accreditation scheme allowing for simplified customs clearance permitting goods to clear EU customs more quickly. Minimising delays at customs is going to be important after Brexit with clearance times anticipated to increase significantly due to the sheer volume of EU/UK declarations that will be required – some estimates see these increasing by almost 500% and many question whether the customs services on either side will be able to cope.

Businesses considering applying for AEO status will need to factor in that the application process can take around 12 months to complete and comes with a heavy administrative burden, including periodic audits. Another consideration is that after Brexit UK businesses will need to have a base of establishment within the EU27 in order to be eligible for AEO accreditation, unless the final Brexit trade deal allows the UK to continue to participate fully in the scheme.

If those hurdles are too difficult for a business to jump quickly then one option might be to outsource haulage and customs clearance to a business that already has AEO certification.

Q7. What arrangements or precautions should we be making or taking with our suppliers?

The first thing to do is think carefully about the particular issues that might be faced in each potential Brexit scenario and plan accordingly.

Suppliers should be asked for their Brexit plans to determine how mature these are and whether a given supplier is alive to the risks that you, as a customer, foresee to your supply chain.

A review of high risk contracts with EU based suppliers or suppliers whose businesses are highly dependant on EU trade (such as parent companies based in the EU or if they have a significant exposure to subcontractors in the EU) is essential to determine if those contracts could withstand likely changes brought about by Brexit. Although the lens is slightly different, the sorts of issues that business should look at to a large degree mirror the list of issues above in answer to Q3.

In addition, business should look at the following:

- **Delivery Implications**:
  - review arrangements and, depending on the likely Brexit scenarios (deal / no-deal and hard/soft), consider whether the relevant supplies will be directly or indirectly affected – for instance, does the supply rely on financial services passporting which look unlikely to be available following any of the possible Brexit scenarios;

- consider whether, and to what extent, customs checks and issues with surrounding infrastructure may cause delays, particular in relation to "just in time" supply chains.

- **Financial Implications**:
  - look at the potential financial impact on suppliers and whether or not a contingency plan should be drawn up against the possibility that particular suppliers' businesses suffer significantly as a result of Brexit with the potential that current contracts become uneconomical for them and/or they become unable, unwilling or delayed in the performance of their obligations. Fighting with a supplier for whom a contract has become uneconomic can be more expensive and time consuming than agreeing an orderly exit and entering into alternative arrangements (which is not to say exits are straightforward or frictionless and one should be extremely cautious about how one goes about exercising any termination rights in a contract as poorly managed terminations can backfire). Where current arrangements do continue, some risks might be able to be managed through the use of financial or parent company guarantees, and/or by requiring suppliers to provide enhanced management information to ensure that you are given the earliest possible warning of any potential problems;
  - consider whether there might be a change to the way in which the suppliers are taxed (VAT/tariffs) and determine who bears that with under your current contract.

- **Data Protection Implications**: review of personal data flows in and out of the EU that support the services that a given supplier provides to your business and whether or not these may be required to be documented in a new way to minimise the effects of Brexit, such as with EU model clauses.

If any negotiations are going to be required, it's advisable to get these underway as soon as possible to avoid the clock running out on you.

Employment / Immigration

Q8. Will we be able to employ EU citizens after 29 March 2019 if there is a deal or if there is no deal?

It is yes in either case.

If there is a deal, then the recent draft of the Withdrawal Agreement allows those EU nationals and their family members already living or working here on 29 March 2019, as well as those who arrive during a transition period ending on 31 December 2020, to continue living and working in the UK until they have accumulated five years and become eligible for permanent residence. They will have a minimum period of at least six months from the end of the transition period, that is by 30 June 2021, to apply for status.

If there is no deal, then EU nationals will nevertheless be able to continue living and working in the UK until the UK government decides to change the law. This is because under the terms of the EU Withdrawal Act 2018 the Immigration (European Economic Area) Regulations 2016 (the "EEA Regulations") (which implement EU freedom of movement rights into UK law) will continue in force after 29 March 2019 until they are repealed by either the "settled status" legislation or any other future legislation[1]. The government have publicly stated that they will roll out the EU Settlement Scheme, which is essentially a mirror image of the rights contained in the draft Withdrawal Agreement, for those EU nationals who are

[1] The *Immigration and Social Security Co-ordination (EU Withdrawal) Bill*, which was given its First Reading in the House of Commons on 20 December 2018, contains provision for the repeal of the EEA Regulations.

resident before the end of the transition period, but the shape of the rules for EU nationals who want to arrive on or after 1 January 2021 is an unknown[2].

Q9. Will the same rules apply that currently apply to Non-EEA employees?

They might do. Successive Home Secretaries have said that details of a future immigration system would be set out in a White Paper on Immigration[3] but the timetable for its publication has been changed several times.

See answer to the next question below.

Q10. What does the Migrant Advisory Committee report say about this?

The latest report was published in September 2018. It has put forward what it thinks is a "desirable migration system for the UK" as follows:

Ending free movement: "This would not make the UK unusual – for example Canada combines a relatively open policy to migration without any free movement agreement.

Ending free movement would not mean that visa-free travel for EEA citizens would end, just that a visa would be needed to settle in the UK for any period of time and to work as is the case for the citizens of some non-EEA countries at the moment."

EU citizens should not have preferential immigration status: "If the UK decides on its new immigration system in isolation from the negotiations about the future relationship with the EU we do not see compelling reasons to offer a different set of rules to EEA and non-EEA citizens. A migrant's impact depends on factors such as their skills, employment, age and use of public services, and not fundamentally on their nationality."

It differentiates between high skilled and low skilled migration and suggests that Tier 2 could be extended to cover EEA citizens with the following changes:

- Abolition of the Tier 2 (General) cap.
- Medium-skilled jobs should be eligible for Tier (2) General not just high skilled jobs as at present.
- The salary threshold at £30,000 should be retained and the list of eligible occupations extended.
- The Immigration Skills Charge should also cover EEA citizens.
- Abolition of the Resident Labour Market Test (RLMT). Instead, the government should apply a robust approach to the salary thresholds and the Immigration Skill Charge are a better way to protect UK workers against the dangers of employers using migrant workers to under-cut UK-born.
- In-country ability to change employers should be made easier for Tier 2 migrants.

It doesn't recommend an explicit work migration route for "low skilled workers" with the possible exception of seasonal agricultural workers.

[2] The position is now clearer following the publication on 19th December 2018 of the White Paper "The UK's future skills-based immigration system" – for details see this link
[3] See note 2

The Government appears to have accepted some of these recommendations. It proposed replacing free movement with a 'labour mobility' framework which will require EU nationals to have a visa in order to work in the UK for an extended period of time.[4]

Q11. Will certain sectors be exempt from the restriction of freedom of movement?

The government has only announced "exemptions" for agriculture.

It has announced a two-year pilot seasonal farm worker scheme, which will run between spring 2019 and December 2020. The pilot will mean fruit and vegetable farmers are able to employ migrant workers for seasonal work for up to six months. 2,500 workers from outside the EU will be able to come to the UK each year, alleviating labour shortages during peak production periods.

But this "privileged access to labour" will come at a price – employers in the agricultural sector will have to pay a higher minimum wage, in the expectation this will increase productivity.

Q12. Will we have to pay a skills charge for EU employees?

We don't know yet, but it looks likely if the UK is not tied to free movement post Brexit. The PM said in October that EU citizens will no longer be given priority to live and work in Britain after Brexit. She said the terms of the final deal with the EU could include mobility concessions, but this would be within the control of the British government.

Instead, EU citizens (presumably those who have not applied for settled status) will be treated in the same way as non EU citizens wishing to work in the UK. Highly skilled workers will be given priority but "low-skilled" (which means low paid) immigration will be cut.

Businesses that don't already have a sponsorship licence will have to apply for one and follow strict rules imposed by the Home Office before they can recruit a non UK citizen. Plus, changes introduced in 2016 mean that large and medium sized businesses have to pay £1000 per year per employee for every employee brought into the UK under Tier 2 of the points based system.

In addition, the government restricts the number of high skilled workers it allows into the UK on Tier 2 visas to 20,700. It is not clear whether the government will adopt the recommendation of Migration Advisory Committee and scrap this cap.

Q13. Are there different rules for EU citizens who are in the UK on 29 March 2019 and for EU Citizens who arrive after 29 March 2019?

Probably not, at least until 31 December 2020. This the end of the "transition period" that is proposed in the draft Withdrawal Agreement (in the event of a deal) and which is also reflected in the EU Settlement Scheme, which will probably be rolled out in the event of a no-deal. During this transition period EU citizens will continue to be able to move to and live in the UK on the same basis as now (ie on a free movement basis). EU citizens and their family members who already live in the UK, or who move to the UK before 31 December 2020, will have until 31 June 2021 to apply for "**settled status**" or "**pre-settled status**" under the EU Settlement Scheme [see below].

[4] In the White Paper the government accepts many of the MAC's recommendations

Any EU citizens who have by 31 December 2020 lawfully resided in the UK for five years will be able to apply for **settled status** and live here for the rest of their lives.

Any EU citizens lawfully residing in the UK on 31 December 2020 who have not spent 5 years in the UK will be allowed to stay to accumulate the required 5 years residence to become eligible for **settled status** – provided that they apply for "**pre-settled status**" by **30 June 2021**.

Q14. What needs to be done to obtain settled status? How does the settled status scheme work? Will settled status apply if there is no deal?

In November 2017, the government published a 'technical note' on EU citizens' rights which set out requirements for EU staff to obtain 'settled status' in the UK. This means they will be able to lawfully live and work in the UK post Brexit.

The scheme has started to be rolled out but will not be fully open until March 2019. The deadline for applying is **30 June 2021** and most people will need to have started living in the UK by **31 December 2020**.

The application form is online and EU nationals will need the following:

Requirement	Proof
Identity	Valid passport or national identity card
Residence in UK * *It is not necessary to provide proof of residence for individuals with a valid permanent residence or valid indefinite leave to remain	P60s or P45s Payslips Bank statements Utility bills Annual business accounts ER contracts or letters confirming employment Letters, invoices or certificates from accredited educational organisations Passport stamps confirming entry at the UK border Airline or train tickets confirming travel into the UK

Individuals need to have been living in UK (for at least six months of each year) for **5 years** before they can apply for settled status.

Fees are £65 for those aged 16 or over and £32.50 for children until the individual already has permanent residence document.

There is an appeal process.

Individuals who have not lived in the UK for five years by 30 June 2021 can apply for **pre-settled status**. Once they receive this and have five years continuous residence, they can apply for settled status.

https://www.gov.uk/settled-status-eu-citizens-families/applying-for-settled-status
It is supposed to be a simple process and decisions will be given "very quickly" according to the government. It also said there would have to be "a very good reason" to refuse an application (unlike the existing residency application process)!

As stated above the Government has publicly stated that they intend to roll out the settled status scheme in the event of a no deal Brexit.

Q15. Will an employer have to check whether an EU citizen employee has a right to work in the UK after 29 March 2019?

Employers should continue to carry out the same checks as they currently do.

The position was confused only two weeks ago, when the Immigration t minister (Caroline Nokes) said that employers would need to carry out additional **right-to-work checks** for EU citizens if no deal is reached. This caused some consternation and since then, she has said, "Employers will of course continue to need to check passports or ID cards – as they do now for EU citizens, and indeed for British citizens, when making a new job offer" … "We will not be asking employers to differentiate even if there is no deal." Indeed the Home Office Employer Toolkit now makes it clear that the current **right-to-work checks** "…*apply until the end of 2020. There will be no change to the rights and status of EU citizens living in the UK until 2021."*

This reaffirms the government's stated intention to roll out the settled status scheme even in the event of a no deal Brexit

This should remove the need, at least until 31 December 2020, for employers to have to rely on the statutory excuse to cover the position where they employ an EU citizen who arrived in the UK after 29 March 2019.

https://www.personneltoday.com/hr/no-deal-brexit-right-to-work-checks-caroline-nokes/

Q16. What will happen in relation to social security payments in case of secondments?

The EU has said that individuals, who are protected by the Withdrawal Agreement, will be able to export relevant social security benefits to EU states and the UK (as per current agreement). This information was based on the Joint Report of 8 December 2017 between the EU and

Contact

For further advice on how to prepare for Brexit, our commercial, immigration and employment law experts are here to advise you on the best course of action.