

Brexit – what’s next?

On 31 January 2020, the United Kingdom’s membership of the European Union finally came to an end. So, what happens now?

Abbie Rumbold explores the certainties and uncertainties for charities and social enterprises.



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Abbie is recommended by *Chambers UK* as a leading lawyer in the sector. She has a particular focus and expertise in social enterprises and was one of the originators of the CIC.

The implementation of the European Union (Withdrawal Agreement) Act 2020 (the Withdrawal Act) put the seal on the United Kingdom’s departure from the European Union on 31 January 2020.

But what exactly has changed? And what’s in store in 2020, and beyond? This article explores the key dates and mechanisms and highlights some of the potential short- and long-term implications for charities and social enterprises.

The legal mechanics

The Withdrawal Act, which amended the European Union (Withdrawal) Act 2018 orchestrated the UK’s withdrawal from the EU on 31 January 2020 – ‘exit day’. Crucially, the legislation provides for a ‘transition’ (or ‘implementation’) period until 11pm on 31 December 2020. During this time, most EU law continues to apply in the UK, even though the UK is no longer a party to the EU treaties.

At the end of the transition period:

- EU law that has already been incorporated into UK law will continue to apply – unless it is changed by supplementary legislation. Much EU law is already embedded into UK law – for example, the rules on advertising and marketing contained in the EU Unfair Commercial Practices Directive.
- Other EU law will apply to the extent that it is incorporated into UK law during – or with effect from the end of – the transition period. Ministers have some powers to achieve this by secondary legislation.

Negotiations between the UK and EU during the transition period will determine the extent to which UK law will mirror – or diverge from – EU law once the transition period ends. So, the nature of the UK’s trading relationship with the EU remains uncertain, and the medium- and long-term future for charities and social enterprises requires a degree of crystal ball gazing. We asked our colleagues in specialist areas for their predictions.

Data protection

Under regulations that came into effect on exit day, the EU General Data Protection Regulation (GDPR) is now known in the UK as the ‘EU GDPR’. The regulations have also generated a new ‘UK GDPR’ by making hundreds of changes (mainly unsubstantive) to the ‘EU GDPR’ text.

However, during the transition period, UK organisations are still bound by EU law. The UK GDPR will come into effect at the end of the transition period.

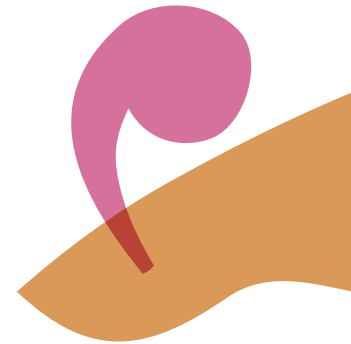
Departure from the EU also has an impact on data transfers where data is transferred from the remaining 27 EU countries to the UK. During the transition period, there is no change and there is no immediate urgency to review arrangements where personal data is being transferred from the EU to the UK. Whether or not organisations need to put in place appropriate safeguards to protect data being transferred from the EU 27 to the UK depends on how the discussions around the UK being awarded ‘adequacy’ go in the transition period.

In any event there will also be obligations under the new UK GDPR, coming into effect at the end of the transition period, for EU controllers offering services into the UK to appoint a UK representative – and vice versa.

State Aid

During the transition period there will be no change from a legal perspective. Clients who give or receive State Aid (or potential aid) will still need to carry out a legal assessment to ensure compliance.

In the longer term there will be a possible reduction in EU-based grant funding, although the UK government may provide alternative sources of funding to replace EU funds (see more on this below). The State Aid regime (in its current form) may well fall away in its entirety and be replaced by something quite different that regulates UK state funding.



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Competition

There will be little or no impact during the transition period. However, the UK authorities may be less focused on competition law enforcement during this period as they take on the EU authorities' case load that has a UK element and get to grips with how this will be managed post 2020.

Longer term, UK competition law may diverge from EU competition law, subject to what is agreed with the EU as part of the trade deal. But charities and social enterprises should not think competition law will diminish post Brexit. Although based on EU law, the UK regime is well established and will continue independently of it.

Intellectual property and trade marks

The provisions around trade marks and Brexit are complex. A key consideration is that, in principle, no trade mark owner should lose any rights that they held before Brexit, although in some situations additional steps may be necessary to keep those rights in place.

EU Trade Marks will cease to have effect in the UK at the end of the transition period. EU Trade Mark registrations will be automatically cloned onto the UK Register, free of charge, giving rise to two separate trade mark registrations (one covering the UK, the other the remaining EU states). EU Trade Mark applications will not be cloned onto the UK Register.

One longer-term concern relates to the requirement for trade mark owners to show that their mark is in use in order to maintain their rights in force. If a registered (UK or EU) mark is not used for a period of five years, then it may be struck from the register upon application by third parties. Where an organisation has an EU Trade Mark that is currently only (or primarily) used in the UK, there is a real risk that the surviving EU component of that registration will in due course become vulnerable to

cancellation, if not at the end of the transition period, then over time.

VAT

During the transition period the UK remains within the EU VAT regime, Single Market and Customs Union. There are unlikely to be major changes until 31 December 2020, but at that point the UK will leave the EU VAT regime and become a 'third country' for the purposes of EU VAT.

The EU and UK will seek to negotiate a Free Trade Agreement during the transition period covering future tariffs and customs controls on the movements of goods. This will not materially affect the post-2020 VAT changes, which will be significant. Changes will include the ending of zero-rated B2B intra-community supplies and the loss of Distance Selling thresholds for UK e-commerce sellers of goods to EU consumers. UK businesses with a foreign VAT registration in the EU may need to appoint a special VAT fiscal representative.

Please contact our VAT specialist Bill Lewis on b.lewis@bateswells.co.uk for more information on the likely changes.

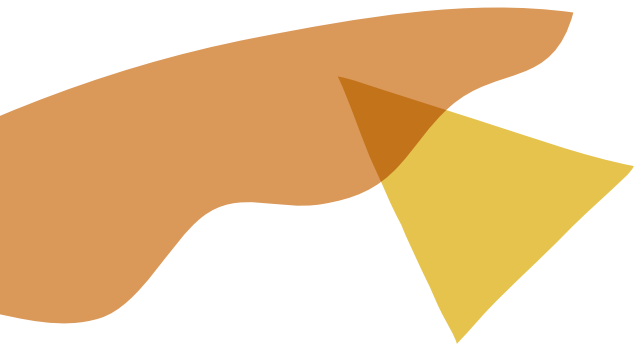
Social finance

Amongst other changes, new regulations will amend retained EU law in relation to the European social entrepreneurship funds, which aim to make it easier for social enterprises to raise funds across Europe, through a designation system and a passporting regime.

Many voluntary sector organisations rely on European funding as part of their income mix. Exactly what will replace some of the major sources of European funding once the transition period ends remains unclear. For example, the government announced that it would create the UK Shared Prosperity Fund (UKSPF) to replace funding from the European Structural and Investment funds, which includes funding that goes to charities and social enterprises in the UK

FIND OUT MORE

You can find a more detailed version of this article, and regular updates, in the 'Navigating Brexit' area of our website at <https://bateswells.co.uk/campaigns/navigating-brexit>. Your regular Bates Wells contact will, of course, be happy to advise on any specific areas of concern.



for projects to create jobs and support economic growth. This commitment was repeated in the Queen's Speech in December 2019 and a consultation on its development, which has been expected for some time, is scheduled for 2020.

Procurement

During the transition period the existing procurement regulations continue to apply to the UK. The UK also remains part of the Government Procurement Agreement (despite not being an EU member state) during this period.

At the end of the transition period, the relevant rules (including EU procurement directives and general principles of EU law) will continue to apply, broadly speaking, to any public procurement procedure launched before the end of the transition period which is not yet finalised, and any call off procedures under framework agreements where the procurement of the framework agreement was launched before the end of the transition period.

From the end of the transition period these regulations can be changed to fit government policy. Fundamentally, although there may be some appetite for a simplification of the detail in the procurement regulations, the current UK government seems unwilling to alter procurement regulations too far as the use of competitive, transparent and fair processes is still considered to be a useful tool to secure best value for public bodies (and the taxpayer) and prevent corruption.

Cross-border disputes

There are no changes to the methods for serving proceedings on defendants in EU countries, and rules for enforcing judgments in the EU during the transition period. Changes after this period will depend on the deal (if any)

that is reached. If you are concerned about the possible impact of Brexit on a particular contractual arrangement, and particularly in relation to any governing law or jurisdiction clauses and the mechanisms for enforcing rights or resolving any disputes that may arise, you should seek advice as early as possible.

Employment

Brexit will not have an immediate effect on UK employment law. However, once the transition period ends the UK will cease to be bound by any new judgment of the Court of Justice of the European Union (CJEU). Old judgments will remain in effect unless and until legislation is repealed or re-enacted. The UK courts may still elect to take account of new CJEU decisions that are relevant to the issue under consideration.

Many core employment rights will not be affected by Brexit as they arise from domestic legislation. These include rights to protection from unfair dismissal; National Living Wage; entitlement to statutory redundancy payments; and most of our family-friendly rights.

Workers' rights that derive from EU legislation may be in line for repeal after the transition period. These include rights under the Working Time Directive. We may see legislation reversing some of the rulings about entitlement to holiday pay that have arisen from decisions of the CJEU.

Immigration

During the transition period, there will be no change to EEA/Swiss nationals' and their family members' right to travel to, live and work in the UK under free movement. EEA/Swiss nationals will continue to be able to enter the UK and evidence their right to work by using their EEA/Swiss passport or national ID card.

Once the transition period has finished, those EEA/Swiss nationals resident in the UK before the end of the transition period who want to continue to lawfully work in the UK will need to apply for status under the EU Settlement Scheme and will need to do so by 30 June 2021. Those arriving in the UK after the transition period ends will need to apply for leave under a new immigration regime that is due to be in place from January 2021.

Right to work checks

All EEA/Swiss nationals can rely on their EEA/Swiss passports to prove their right to work until 31 December 2020. Any new EEA/Swiss national hires joining an organisation between 31 January 2020 and 30 June 2021 will be able to choose to provide either their status under the EU Settlement Scheme or their EEA/Swiss passport as evidence of their right to work: employers will not be able to demand to see the EU Settlement Scheme status for new hires if they are provided with an EEA/Swiss passport.

From July 2021 it will be mandatory for EEA/Swiss nationals to have an additional status to prove their right to work in the UK. But right to work checks are not retrospective and employers will not need to rerun checks on staff they have hired prior to 31 December 2020 on the basis of their EEA/Swiss passport.

It is also worth remembering that it is not necessarily just EEA/Swiss nationals who will be affected. Employers may have non-EEA national employees who are working by virtue of being the family member of an EEA/Swiss national. They may also have British employees who have EEA/Swiss family members and are therefore interested to know what they should be doing in the future.