Brexit – where are we now?

The United Kingdom left the European Union on 31 January 2020. We are now in a transition period due to end on 31 December 2020.

This briefing outlines the legal mechanics of Brexit, the likely timetable and the potential short and long term implications for charities and social enterprises in specific areas.

The Legal Framework

The European Union (Withdrawal Agreement) Act 2020 ("**the Withdrawal Act**") received Royal Assent on 23 January 2020. The Withdrawal Act, building on previous Brexit legislation (the European Union (Withdrawal) Act 2018):

- gave the government permission to ratify the withdrawal agreement negotiated with the EU in October 2019;

- orchestrated the UK's departure from the EU at 11pm on 31 January 2020 – **exit day**;

- provided for a **transition (or implementation) period** running from exit day until 11pm on 31 December 2020; and

- provided that while the European Communities Act 1972 (which is the legislation incorporating the EU treaties into UK law) was repealed on exit day, its effect will be preserved until the end of the transition period.

So, during the transition period, most EU law continues to apply in the UK, even though the UK is no longer formally party to the EU treaties. The EU institutions and other bodies, offices and agencies continue to exercise their powers under EU law in relation to the UK. The Court of Justice of the European Union ("**CJEU**") has jurisdiction in relation to the UK and the interpretation and application of the withdrawal agreement. But the UK now has no institutional representation and no role in decision-making.

Broadly speaking, at the end of the transition period:

- any EU law that is already formally incorporated into UK law will continue to apply, unless Parliament legislates to change it. 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 only apply to the extent that it is incorporated into UK law during the transition period – or with effect from the end of the transition period. Ministers have some powers to achieve this using secondary legislation.

What remains unclear is the extent to which UK law will mirror – or diverge from – EU law once the transition period ends. Trade talks between London and Brussels are now under way.

The EU has indicated that it will require UK law to be the same as EU law both at the time of transition and in the future, in order to preserve a level playing field and ensure fair competition for businesses. UK government ministers have said this is unacceptable and the UK should not have to follow EU rules to trade. Another source of contention is if a deal is reached but broken, should the CJEU have jurisdiction? The UK government does not want the CJEU to have a role.

And so the nature of the UK's trading relationship with the EU remains uncertain. If a comprehensive future UK-EU relationship agreement does not come into force, or have provisional application, by the end of the transition period, this will result in a form of "no-deal" scenario. Both the UK and EU want a deal to be reached, but both parties appear to be preparing for a future without one.

What does all this mean in practice? It is clearly difficult to say, as so much is still undecided, but here our experts in particular areas give their thoughts on the likely short and long term impact of Brexit.

Data Protection

The Data Protection, Privacy and Electronic Communications (EU Exit) Regulations came into effect from 31 January 2020.

These Regulations mean that the EU's General Data Protection Regulation (GDPR) will become known in the UK, after the end of the transition period, as the "EU GDPR". The Regulations also create a new "UK GDPR" by making hundreds of changes (mainly unsubstantive, for example replacing or deleting references to EU institutions) to the "EU GDPR" text. And hundreds of changes are made to the Data Protection Act 2018 to accommodate the reference to the new "UK GDPR".

Issues around the lawful transfer of personal data from the EU to the UK in the event of a no-deal Brexit have been postponed to the end of the transition period (because the UK is treated 'as if' it remains in the EU for these purposes during this period, and the UK Government has confirmed it will reciprocate). Since the transition period will end on 31 December 2020 (and there is little prospect of an extension), the question of whether the UK will receive an adequacy finding from the European Commission is becoming increasingly more critical. It's possible that the UK could receive a preliminary or provisional adequacy finding depending on what political deal is thrashed out – this would then enable (at least in the short term) data transfers from the EU to the UK to continue without additional complications. Cautious organisations should review their arrangements to identify where personal data is transferred from the EU to the UK, then consider what steps they could implement to keep that personal data protected as required by the EU GDPR, as well as also continuing to keep a watching brief on the EU-UK negotiations. In any event, references in contracts may need to be updated so that, for example, they refer to the "UK GDPR" and contain other relevant references to the UK and UK institutions.

Once the transition period ends, there are obligations under the new UK GDPR for EU controllers offering services into the UK to appoint a representative – and vice-versa. This is because both the EU GDPR and the UK GDPR have the potential to apply to organisations outside of the EU, and the

UK, respectively. So in principle a UK based organisation which also operates in the EU could be required, for example, to appoint an "EU GDPR" representative, and vice-versa.

State Aid

During the transition period there has been no change from a legal perspective. Charities and social enterprises that give or receive State Aid (or potential aid) still need to carry out a legal assessment to ensure compliance. This has been very evident during the coronavirus pandemic when the UK Government has sought European Commission approval for its various business relief schemes. It must then in turn insist on continuing compliance as grant monies 'flow down' to beneficiary organisations.

If the European Commission and UK Government cannot agree on a common way forward for State Aid funding, in the longer term there will be a significant reduction in EU-based grant funding, although the UK government may well provide alternative sources of funding to replace EU funds (see more on this below).

It is becoming increasingly plausible that the State Aid regime (in its current form) may fall away in its entirety and be replaced by something quite different which regulates UK state funding of UK organisations. As it stands, the draft new UK regime (similar to the existing regime, but where there is a potential impact on UK to EU markets) - of which little has been spoken more recently - is seen as problematic by UK lawyers and there is some doubt that the draft will ever become law - Boris Johnson has indicated that the UK Government would like to subsidise business more directly and removing State Aid rules would allow it to do so. The European Commission still wishes to maintain a regime which regulates funding which could distort competition between the UK and the EU. There is definitely a current impasse between the UK and EU negotiating positions on State Aid.

Charities and social enterprises which are recipients or potential recipients of State Aid funding need to be aware that the situation post 2020 is not yet determined and is something of a guessing game at present.

Competition

There has been little or no impact on UK competition law during the transition period. Procedurally however, the UK authorities may be less focussed on competition law enforcement during this period as they prepare to take on the UK element of 'live' and emerging EU cases. Post 2020, how future cases will be handled by the UK authorities may be subject to new legislation.

Short-term there will be no discernible difference for the majority of charities and social enterprises but longer term UK competition law may diverge from EU competition law as European Commission decisions and CJEU case law no longer take legal precedence. Whatever happens, the CMA's expanded investigative case load means it will become a much busier regulator. The CMA has been granted increased public funds and resources to reflect its increased functions.

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.

Procurement

There has been little or no immediate impact upon procurement laws during the transition period: most EU laws, including the procurement regulations, continue to apply to the UK. The UK also remains part of the Government Procurement Agreement ("**GPA**") (despite not being an EU member state) during this period.

Complications will potentially arise when the transition period comes to an end. Under current proposals, at the end of the transition period the relevant rules (which would include the EU procurement directives and general principles of EU law) would continue to apply to:

- any public procurement procedure launched before the end of the transition period and not yet finalised on the last day of it; and

- any call off procedures under framework agreements where the procurement of the framework agreement was launched before the end of the transition period until the framework agreement expires (or is terminated).

The European Union (Withdrawal) Act 2018 transposes the procurement regulations into UK law, but from the end of the transition period these regulations can be changed to fit government policy. It seems unlikely that we will see drastic changes as, depending on what is agreed, there will probably still be strong ties to the EU that will affect procurement.

For example, if the UK becomes a member of the GPA at the end of the transition period, contracting bodies will generally be required to open up any procurements covered under the UK market coverage schedules to suppliers in other GPA party countries (including EU countries), and comply with the GPA rules regarding transparency, competitive tendering and remedies. Amendments to the procurement regulations may also be limited by any future trade agreements with EU countries and the current draft political declaration on the framework for the future relationship contains provisions regarding public procurement which suggest that commitments will actually go beyond the GPA standards and remedies.

Fundamentally, although there may be some appetite for a simplification of the detail in the procurement regulations, the UK government seems unwilling to alter UK 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. Furthermore, keeping UK public procurement open to international competition may also enable UK businesses to take advantage of reciprocal rights to participate in tenders abroad.

Funding for Social Impact

The social finance landscape post-Brexit continues to be uncertain. Many voluntary sector organisations, including charities and social enterprises, rely on European funding as part of their income mix. For example, Social Enterprise UK's 2018 report, Trading for Good, identified that European funding forms part of the income mix for 18% of smaller social enterprises in the most deprived areas and 13% in the country as a whole.

Exactly what will replace some of the major sources of European funding remains unclear. For example, the European Social Fund, one of the European Structural and Investment funds ("**ESIF**"), provides funding to charities and social enterprises in the UK for projects to create jobs and support economic growth. The withdrawal agreement between the UK and the EU includes provisions to maintain the current structural funding arrangements until the end of 2020, and funding already agreed will continue to be paid until the end of the funding programme. To replace funding from the ESIF, the government announced that it would create the UK Shared Prosperity Fund ("**UKSPF**"). As yet, we are not aware of any definitive proposal on the structure of the UKSPF.

The government's commitment to create the UKSPF was repeated in the Queen's Speech in December 2019, and the Conservative party website states intentions to "introduce the UK Shared Prosperity Fund when EU Structural Funds start to taper off from 2020-21", to allow "organisations such as charities and other third-party bodies to deliver a wide range of support for people across the UK". A consultation on the UKSPF had been expected for some time, but it is currently not clear whether a full consultation will now be held. Decisions on the development of the UKSPF were to be made as part of a Spending Review launched in the 2020 Budget, which stated that, at a minimum, the UKSPF "will match current levels of funding for each nation from EU structural funds" and that funding will be "be realigned to match domestic priorities, not the EU's, with a focus on investing in people". The conclusion of the Spending Review has been postponed due to the pandemic.

More broadly, measures have been taken to try to ensure that UK law will continue to function effectively where it refers to or interacts with European law. For example, new regulations will amend retained EU law in relation to the European social entrepreneurship funds. European social entrepreneurship funds are subject to European regulations that aim to make it easier for social enterprises to raise funds across Europe, though a designation system and a passporting regime. The new UK regulations aim to ensure that UK law continues to operate effectively in relation to these funds after the transition period ends.

Unless specified otherwise, existing grant and funding agreements continue in force between the parties regardless of exit day and the transition period. If not already reviewed, it would be sensible for charities and social enterprises to consider which of their existing funding arrangements relate, directly or indirectly, to funding provided by the EU or other organisations based in Europe. This should help them to consider their relationships with their funders, and see where it may be necessary to seek advice on how their contractual arrangements may impact them going forwards.

Over the remaining months of the transition period, a clearer picture of the impact finance landscape should emerge, along with the terms of UK's future relationship with the EU. It is hoped that this will give charities and social enterprises more certainty upon which to plan and, as may be required, adapt their funding strategies for a future outside of the EU.

Employment

Brexit will not have an immediate effect on UK employment law. However, the UK will cease to be bound by any new judgment of the CJEU once the transition period has concluded. 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.

After the transition period, 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.

Other workers' rights, which derive from EU legislation, may be in line for repeal after the transition period. These include rights under the Working Time Directive, for instance to the maximum average 48 hour working week, which workers in the UK can already be asked to opt out of. The UK's provision for paid holiday for workers is already more generous than the minimum required under the Working Time Directive and so it is unlikely that this will be altered.

We may see legislation reversing some of the rulings about entitlement to holiday pay that have arisen from decisions of the CJEU, such as holiday continuing to accrue while workers are off work sick, and overtime having to count towards holiday pay. Equally, we are likely to see a tougher approach being taken to on call time not being treated as working time. New legislation may also enable greater harmonisation of employees' terms and conditions after a TUPE transfer, limit the rights of agency workers, and introduce a cap on compensation for discrimination claims.

This is of course a speculative view at this stage, as much will depend on what is politically viable, and what is viewed as a priority for the government.

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, though in some situations additional steps may be necessary to keep those rights in place.

Some headline points concerning the nuts and bolts are set out below:

- EU Trade Marks will cease to have effect in the UK at the end of the transition period.

- EU Trade Mark *registrations* (including those expired up to six months prior to the end of the transition period) 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. If a trade mark owner wishes to preserve its position, it will need to file a separate UK trade mark application within nine months of the end of the transition period. Such applications may, upon application, be backdated to the effective date of the original EU Trade Mark application.

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 will remain 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 Free Trade Agreement which the EU and UK will seek to negotiate during the transition period will include future tariffs and customs controls on the movements of goods, but this will not materially affect the post-2020 VAT changes. These will include:

- The UK no longer needs to retain the EU VAT Directive rules in its own VAT legislation. For example, it will no longer have to maintain a minimum standard VAT rate of 15%. However, since the UK's actual standard VAT rate is currently 20%, and this tax accounts for almost a third of tax revenues, any reduction is highly unlikely in practice.

- The UK will have complete control over its reduced VAT rates, which are currently restricted within the rules of the EU VAT Directive.

- The ending of zero-rated B2B intra-community supplies; all movements will become imports or exports, subject to UK or EU import VAT. By way of compensation, the UK will introduce a Postponed Accounting import VAT deferral scheme so no cash VAT payment has to be made by business importers to UK customs. However, many EU countries do not offer the same scheme for UK businesses importing their goods.

- The loss of Distance Selling thresholds for UK e-commerce sellers of goods to EU consumers. Goods will now be subject to import VAT, and UK sellers will have to consider VAT registering in Europe immediately. Similarly, EU e-commerce sellers may now need to register immediately for UK VAT if they have been selling to UK consumers under the £70,000 threshold.

- Any UK business with a foreign VAT registration in the EU may now face the obligation to appoint a special VAT fiscal representative. This applies in 19 of the 27 EU states. These agents hold direct liability for any unpaid VAT, and therefore require cash deposits or bank guarantees in exchange.

- The scrapping of the UK £15 low-value consignment stock relief which exempts imports of goods (including from the rest of the EU after Brexit) from VAT. Instead, for goods at £135 or below, sellers or their postal service will have to declare and pay to HMRC via a new, quarterly filing, VAT charged at the point-of-sale.

- For UK sellers of digital services to EU consumers, the UK will no longer be a member of the EU Mini One-Stop-Shop single VAT return scheme. UK sellers of electronic, broadcast or telecoms services to consumers will therefore have to register in any other EU state, as a non-Union business, to continue to file their VAT declarations for EU e-service sales. EU sellers into the UK will have to register with the UK's HMRC for the same declaration. Any non-EU business which used the UK MOSS registration will have to re-register for MOSS in the EU and separately in the UK under a regular VAT return.

- There will be limited changes to the VAT on services for B2B transactions after the UK leaves the EU VAT regime. The reverse charge will still apply. In the future, the UK may deviate from some of the use and enjoyment rules.

- UK businesses incurring EU VAT on travel, hotel or other expenses will no longer be able to use the 8th Directive online VAT reclaim system operated via HMRC. Instead, they will use the 13th Directive paper-based reclaim process. This requires individual claims to each country where there is a VAT claim. Last UK claims via the 8th Directive will be for the final quarter of 2020.

- As part of the withdrawal agreement, Northern Ireland (NI) will enter into a special VAT and customs relationship with the EU. Whilst NI will remain within the UK VAT area, it will track EU rules, including zero-rating for VAT on intra-community supplies across the Irish border. EU VAT on imports into Ireland via Northern Ireland will be collected by the UK authorities.

Cross Border Disputes

During the transition period, most of the EU law provisions continue to apply, as the UK is treated as if it is a member state. In relation to service of proceedings on defendants in EU member states, the EU Service Regulation will apply until the end of the transition period. At the end of the transition period the EU Service Regulation will be revoked, however the Hague Service Convention will continue to apply in relation to service of proceedings.

Charities and social enterprises with contracts with a third party(ies) in the EU (or about to enter into one), or which are currently involved in or may become involved in cross-border disputes within the EU, should be mindful that some elements of their case may be affected by changes to (or delays in implementing) post-Brexit law and procedure. If a charity or social enterprise is 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 their rights or resolving any disputes that may arise, they should certainly seek advice as early as possible.

English law and the English court system are currently a popular choice for contracts around the world. Disputes involving international contracts are often resolved here in the UK, and London is the most popular arbitration centre in the world. This may change in the future, after the transition period, as the UK leaves the EU; England, and English law, may no longer be the most attractive option for resolving cross border legal disputes.

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 wanting to continue to lawfully work in the UK will need to apply for status under the EU Settlement Scheme.

To be eligible to apply under the EU Settlement Scheme, EEA/Swiss nationals and their family members will need to be resident in the UK by 31 December 2020. Applications under the EU Settlement Scheme must be submitted by 30 June 2021 in order for the applicant to continue living in the UK after that date. This includes applications by EEA/Swiss nationals already with documents certifying permanent residence, who will need to re-apply for new documentation. British and Irish nationals will not need to do anything.

EEA/Swiss nationals who have been lawfully in the UK for five years will be able to apply for "settled status". EEA/Swiss nationals lawfully in the UK for less than five years will be granted a time limited "pre-settled status" to allow them to remain in the UK for a further five years in order to obtain settled status.

Family members of EEA/Swiss nationals will be able to apply to join EEA/Swiss nationals in the UK after 31 December 2020 provided the relationship existed on 31 December 2020 and it continues to exist when the family members come to the UK.

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.

However, 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.

Right to work checks are not retrospective and employers will not need to rerun checks on staff whom they have hired prior to 31 December 2020 on the basis of their EEA/Swiss passport. Employers will keep the statutory excuse for any EEA/Swiss national they currently employ provided that the employer completed the appropriate right to work checks prior to the commencement of the employment. If it is later discovered that the employee did not have the right to work at any point they were employed, the employer would have a statutory excuse for any penalty imposed for employing an illegal worker. If an employer was to discover in the future that an EEA/Swiss national employee did not have the right to work then they would not be able to continue to employ them.

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

Please contact Abbie Rumbold on a.rumbold@bateswells.co.uk, or your usual Bates Wells contact, for further information or advice on the issues raised in this briefing.

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Disclaimer - The content of this briefing is necessarily of a general nature. Specific advice should always be sought for specific situations.