Brexit – where are we now?

The United Kingdom is now in a new relationship with the European Union.

The UK formally left the EU on 31 January 2020, but remained in a "transition period" throughout the rest of 2020, during which most EU law continued to apply in the UK. The real change began when the transition period came to an end on 31 December 2020.

A series of agreements concluded at the end of December 2020 now governs the UK's relationship with the EU. For the most part, EU law no longer has direct effect in the UK, but much EU law has been integrated into our domestic legal system.

This updated briefing from Bates Wells, which includes developments in the early months of 2021, outlines how UK law is affected by Brexit and explores the impact of the UK's new relationship with Europe on charities and social enterprises in specific areas.

Legal framework

Prior to 31 December 2020, a great deal of EU law applied in the UK, either because it had been incorporated into UK law, or by virtue of the EU treaties which applied during the UK's membership of the EU and during the transition period.

Post-Brexit, the European Union (Withdrawal) Act 2018 ("the Withdrawal Act") aims to provide a degree of continuity, by creating a body of what is known as "retained EU law" which continues to apply in the UK. This is essentially a snapshot of EU law as it applied in the UK on 31 December 2020 and includes, broadly:

- any EU law that had been formally incorporated into UK law prior to 31 December 2020 (such as legislation implementing EU Directives);
- EU law that applied directly in the UK without needing implementing legislation (including Regulations, such as the General Data Protection Regulation);
- other EU rights that were recognised and available under UK law.

"Navigating the new legal landscape is a complicated task.

Retained EU law is subject to a significant number of amendments which came into force on 31 December 2020. The Withdrawal Act gives ministers wide-ranging powers to make more changes in order to eliminate discrepancies stemming from the UK's withdrawal from the EU.

The UK's future relationship with Europe is governed by the terms of three agreements negotiated with the EU at the end of 2020. The main agreement – the Trade and Cooperation Agreement (TCA) – was approved by the UK Parliament in the European Union (Future Relationship) Act 2020, which provides for UK law to be modified to reflect the terms of the TCA.

In some respects, Northern Ireland remains aligned with EU rules, by virtue of "the Northern Ireland Protocol" which was agreed as part of the withdrawal agreement negotiated with the EU in October 2019.

While rulings of the Court of Justice of the European Union (CJEU) may have some relevance to the interpretation of retained EU law, and enforcement of the withdrawal arrangements, for the most part the CJEU no longer has jurisdiction over UK matters.

Given the integration of UK and EU law prior to Brexit, the process of disentangling the two different systems – ensuring that relevant aspects of EU law are enshrined within UK law, but irrelevant aspects are not – is far from straightforward. Navigating the new legal landscape is a complicated task. Most weeks see new Brexit-related secondary legislation making its way onto the statute book, and the courts have begun to focus on the interpretation of post-Brexit law. We can continue to expect a great deal of new legislation – and some uncertainty – in the months and years ahead

Data Protection

The Data Protection, Privacy and Electronic Communications (EU Exit) Regulations, which came into effect on 31 January 2020, continue to apply following the end of the transition period. Under these Regulations, the EU's General Data Protection Regulation (GDPR) is now known in the UK 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. These changes can be reviewed through the Keeling Schedule on the Brexit Regulations.

The European Commission has now awarded the UK adequacy status confirming that transfers of personal data from the EU to the UK can take place without further administrative hurdles. Since the end of the transition period, data transfers from the EU to the UK have continued without any further legal restrictions (because the UK has been treated 'as if' it remains in the EU for these purposes, and the UK government has confirmed it will reciprocate – despite the UK now being classified as a 'third country'). The Commission published a lengthy Implementing Decision on 28 June 2021 examining the UK legal framework in detail and confirming that the UK's status as adequate lasts for 4 years. Unless and until the adequacy decision is challenged, data transfers can flow unrestricted from the EU to the UK. However, the decision to give the UK adequacy status is not without its detractors and we could see a legal challenge through the courts before too long.

In any event, it remains prudent for organisations to review their arrangements to identify where personal data is transferred from the EU to the UK. Additionally, going forward UK organisations will need to begin to move away from relying on the European Commission Standard Contractual Clauses (SCC) and begin using the new standard contractual clauses provided by the Information Commissioner's Office (ICO) as and when these become available. The European Commission has recently published its final version of the new modular form for SCC and it's possible the new ICO version will mirror the Commission's new approach. In relying on the SCC, organisations will also need to consider the recent finalised recommendations from the European Data Protection Board on supplementary measures and any further guidance from the ICO following the significant *Schrems II* decision from July 2020.

References in contracts and privacy notices may also 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.

Organisations also need to comply with any obligations under the new UK GDPR for EU controllers or processors offering services into the UK to appoint a representative in the UK – 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.

"Hundreds of changes are made to the Data Protection Act 2018 to accommodate the reference to the new UK GDPR."

State aid/subsidy control

Under the TCA, the UK has agreed to a new subsidy control regime broadly in line with EU state aid.

'Subsidies' are, broadly, defined along similar lines to the EU's definition of 'state aid', including – for example – guarantees and tax benefits, as well as direct grants. Going forward, grantors and recipients of future UK government derived subsidies (such as central and local government, charities, not-for-profits and social enterprises) still need to carry out a legal assessment to ensure compliance.

In a similar vein to the pre-2021 position, the UK's new regime contains transparency provisions enabling interested parties to have visibility over possible unlawful subsidies which could put them at a competitive disadvantage. In the event of non-compliance, and if challenged, subsidies may be subject to recovery.

Many of the types of state aid permissible under EU state aid law – including de minimis aid, aid which is for services of general economic interest, and aid relating to a national or global economic emergency (such as in relation to the Covid-19 pandemic permitted under EU state aid law by way of the Temporary Framework) – are also broadly permissible under the new UK regime. However, some legal requirements of the permitted aid, including financial thresholds, now differ.

Further, as part of the agreement in relation to the Northern Ireland Protocol, the EU's state aid regime will continue to apply in full where it is possible that a subsidy might affect trade between Northern Ireland and the EU. In addition, any subsidy relevant to Northern Ireland might be subject to both the EU's state aid regime and the UK's new subsidy control regime. Organisations with any connection to Northern Ireland should bear this in mind.

A significant change is that the UK's new regime is (for the most part) no longer under the jurisdiction of the EU and its courts.

Finally, after a period of uncertainty in the absence of specific national legislation, a Subsidy Control Bill was introduced to Parliament at the end of June 2021.

This Bill provides much more detail on the new framework, going beyond the subsidy control obligations set out in the TCA. The results of an earlier public consultation as to how the new regime should function have also been published.

In the Bill, a new body called the Subsidy Advice Unit or SAU, has been proposed. The SAU will be a function of the Competition and Markets Authority (CMA) and have a reporting and advisory role regarding subsidies which are 'referred' to it. However, it is not currently proposed that the CMA will be able to prohibit subsidies outright. The Bill also provides that the Competition Appeal Tribunal will hear subsidy control disputes on judicial review grounds.

"The UK's new regime is (for the most part) no longer under the jurisdiction of the EU and its courts…. the Competition Appeal Tribunal will hear subsidy control disputes on judicial review grounds."

Recipients of subsidies such as charities, not-for-profits and social enterprises should generally continue to be eligible for the type of government funding for which they were previously eligible, but the application process for grant and similar public funding look rather different.

So, whilst the UK has agreed with the EU a new UK subsidy control regime to help ensure continued fair trade and competition, the proposed new regime under the Bill is not altogether in the same mould as EU state aid. We will keep you updated as the Bill progresses through Parliament.

Competition

The TCA requires the UK to maintain an effective competition regime. EU competition law relating to anti-competitive behaviour, where not effectively replicated in our own national laws, has now become law in the UK as retained EU law.

So, whilst the letter of EU competition law no longer applies in the UK, there will be few changes to how competition law has an impact on the behaviour of organisations. Many of our clients – whether commercial entities such as limited companies or other organisations such as charities and not-for-profits – will still need to understand and comply with UK competition law which is and will continue to be very much aligned with the EU competition regime for some time to come. You will also still need to understand and comply with EU competition law if your organisation is active in the EU (just as before Brexit).

"It would be a mistake to think that UK competition law will diminish post Brexit. If anything, it will grow in stature and evolve. The landscape will be more complex for organisations which have activities in both the UK and the EU."

The Competition and Markets Authority (CMA), the UK competition and consumer regulator, has now acquired greater rights of jurisdiction in both behavioural competition law (that is anti-competitive agreements and conduct such as price-fixing, bid-rigging and market sharing) and merger control law regulating mergers and acquisitions of competitors. In respect of both these areas, the CMA is now able to commence parallel investigations where the European Commission is also investigating.

Many organisations will therefore see no discernible difference in how competition law applies to them 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. Competition policy in the UK is currently being reviewed by the government and is due to be consulted on publicly later in 2021. There are definitely changes afoot on the UK and EU sides.

Whatever happens, the CMA's expanded investigative case load means it will become a much busier regulator, especially if it also assumes the role of subsidy control regulator. It has been granted increased public funds and resources to reflect its increased functions such as in relation to digital markets and the UK 'internal' market.

It would therefore be a mistake to think that UK competition law will diminish post Brexit. If anything, it will grow in stature and evolve. The landscape will be more complex for organisations which have activities in both the UK and the EU.

Procurement

What does Brexit mean for public procurement in the UK?

Generally, there is little immediate substantive impact upon procurement laws as a result of the end of the transition period and the implementation of the TCA: the UK's procurement regulations, based on EU law adopted during the UK's membership of the EU, continue to take effect.

This means that public procurement in the UK continues almost entirely 'business as usual', for now – and contracting authorities should continue to advertise procurements, and comply with relevant procedures as set out in the Public Contracts Regulations 2015 (or the Scottish, utilities, concession or defence specific regulations, as appropriate) and the principles of transparency, equal treatment and non-discrimination.

However, organisations should be aware of some significant consequential amendments arising from the end of the transition period:

- First, in place of the Official Journal of the EU (OJEU), contracting authorities in the UK must now use the new Find a Tender Service (FTS), in the UK (except where EU law continues to apply, as set out below). UK based bidders for EU public contracts should continue to keep an eye on OJEU for those contracts, in addition to ensuring they have appropriate monitoring of the new FTS in place, for UK opportunities. The government has published a Procurement Policy Note about the new 'Find a Tender' Service.

- Second, the government has published a Procurement Policy Note suggesting that contracting authorities now have a greater degree of flexibility for 'below threshold' contracts and can, in particular, reserve such opportunities for Voluntary, Community and Social Enterprises (VCSEs), Small and Medium sized Enterprises (SMEs), or bidders from particular geographic areas.

- Finally, the relevant financial thresholds for UK procurement will now be set at a UK level, rather than an EU level, and the UK government (namely the Cabinet Office) takes on, for the most part, functions held by the European Commission in relation to procurement.

"Public procurement in the UK continues almost entirely 'business as usual', for now – and contracting authorities should continue to advertise procurements, and comply with relevant procedures."

Is EU procurement law still relevant at all?

Yes, EU procurement law (rather than the UK's own procurement regulations) will continue to apply to:

- any public procurement procedure launched but not yet completed before the end of the transition period; 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). Framework agreements can generally last up to four years, or eight years in the context of utilities, leaving an extended role for EU procurement law in the UK.

What next for public procurement in the UK?

Going forward, the UK's procurement regime is open to reform to fit government policy.

In December 2020 the government published a Green Paper on 'Transforming Public Procurement', which promises to overhaul the UK's public procurement regime and cut red tape, based on principles of "value for money", "integrity", "the public good", and "efficiency". A public consultation on the proposals closed on 10 March 2021.

As the UK became a member of the World Trade Organisation's Government Procurement Agreement (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. The Public Contracts Regulations 2015 have now been amended to reflect the UK's membership of the GPA, obliging contracting authorities to treat suppliers in GPA countries no less favourably than UK-based suppliers.

Amendments to the procurement regulations may also be limited by any future trade agreements with EU countries and the TCA, which includes commitments on public procurement which go beyond the GPA standards and remedies, bringing into scope certain procurements which would not otherwise be within the scope of the GPA. These provisions largely mirror, and build upon, those set out in the earlier political declaration on the framework for the future relationship between the UK and the EU (which preceded the TCA).

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.

"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."

Funding for social impact

Many voluntary sector organisations, including charities and social enterprises, have relied on European funding as part of their income mix. For example, the European Social Fund, one of the European Structural and Investment Funds (ESIF), provided funding to UK charities and social enterprises for projects to create jobs and support economic growth. The withdrawal agreement between the UK and the EU included provisions to maintain structural funding arrangements until the end of 2020, and funding already agreed is expected to continue to be paid until the end of the funding programme.

Although the post-Brexit social finance landscape therefore continues to be somewhat uncertain, a number of new UK funding schemes have been announced. To replace ESIF funding, the government announced that it would create the UK Shared Prosperity Fund (UKSPF). The Conservative party website states that the UKSPF will allow "organisations such as charities and other third-party bodies to deliver a wide range of support for people across the UK".

In the Spending Review 2020, the government announced that funding for the UKSPF will be increased so that total domestic, UK-wide funding will at least match EU receipts, on average reaching around £1.5bn per year. The Spending Review sets out some priorities and information about the intended approach to deploying the fund, but further details are expected in a "UK Shared Prosperity Fund Investment Framework" later this year. Recent government announcements indicate that the UKSPF is to launch in 2022.

Following commitments in the Spending Review, the government recently announced an additional £220m of investment through the UK Community Renewal Fund for 2021-22, focusing on: Investment in skills; Investment for local business; Investment in communities and place; and Supporting people into employment. The fund is intended to help the transition from EU structural funding and to prepare local areas for the UKSPF, through funding pilots of new ideas and programmes.

Details of the new Levelling Up Fund have also now been published, following its announcement in the Spending Review as being "worth £4 billion for England, that will attract up to £0.8 billion for Scotland, Wales and Northern Ireland", to invest in local infrastructure that "has a visible impact on people and their communities and will support economic recovery". Funding bids will be submitted by local authorities, with local stakeholder consultation, apart from in Northern Ireland where community level stakeholders can bid directly.

The new £150m Community Ownership Fund has also been launched, intended to help ensure that community assets continue to play a central role in towns and villages across the UK. From summer 2021, community groups will be able to bid for up to £250,000 matched funding to help them buy local assets, such as sports clubs and grounds, pubs, theatres and post office buildings, to run as community-owned businesses. Up to £1m of matched funding may be available in some exceptional cases. The government's policy paper on the fund states that in most circumstances, "bids should be made from community and voluntary organisations with formal governance in place, such as a Community Trust".

More broadly, in preparation for Brexit measures were taken to try to ensure that UK law continues to function effectively where it refers to or interacts with European law. For example, new regulations have amended retained EU law in relation to the European social entrepreneurship funds. These funds are subject to European regulations that aim to make it easier for social enterprises to raise funds across the European Union, through 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 in the UK (now termed "Social Entrepreneurship Funds"), now that the transition period has ended.

In relation to existing grant and funding agreements, unless specified otherwise these continue in force between the parties regardless of the UK's departure from the EU 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.

Employment

Brexit has not had an immediate effect on UK employment law. However, following the end of the transition period the UK is no longer bound by any new judgment of the CJEU. Old judgments will remain in effect unless and until legislation is repealed or re-enacted. Any cases that were brought before the CJEU prior to the end of the transition period will continue to fall within the CJEU's jurisdiction until they are finalised and the judgments will be binding as precedent. Going forward, 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 are not 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 now be in line for repeal. 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. However, both sides have committed not to weaken or reduce their labour and social standards below the levels in place at the end of the transition period in a manner that would impact trade or investment.

"Many core employment rights are not 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."

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 have ceased to have effect in the UK as of the end of the transition period.
- EU Trade Mark registrations which were registered at the end of the transition period have been 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 that were not yet registered as of the end of the transition period have not been 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 become vulnerable to cancellation, if not at the end of the transition period, then over time.

"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."

VAT

During the transition period the UK remained within the EU VAT regime, Single Market and Customs Union. Now that the transition period has ended, the UK has left the EU VAT regime and become a "third country" for the purposes of EU VAT.

The TCA does not materially affect the post-2020 VAT changes. These include:

- The UK no longer needs to retain the EU VAT Directive rules in its own VAT legislation. For example, it no longer has 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. In the March 2021 Budget, the Chancellor announced that the standard rate of VAT would remain at 20%.

- The UK has complete control over its reduced VAT rates, which were previously restricted within the rules of the EU VAT Directive. So for example the government has already abolished the controversial 5% VAT charge on feminine hygiene products so these can now be sold at the zero rate of VAT.

- The ending of zero-rated B2B intra-community supplies; all movements have become imports or exports, subject to UK or EU import VAT. By way of compensation, the UK has introduced 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 are now subject to import VAT, and UK sellers will have to consider VAT registering in Europe. Similarly, EU e-commerce sellers may now need to register 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 is no longer 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 are limited changes to the VAT on services for B2B transactions. The reverse charge still applies. 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 are no longer 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.

- Northern Ireland has entered into a special VAT and customs relationship with the EU. Whilst Northern Ireland remains 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.

- In a speech in November 2020, the Chancellor stated that the intention was to treat exports of UK financial services to the EU in the same way as financial services exports to any other country. These changes came into effect on 1 January 2021, meaning that UK firms will be able to reclaim input VAT on financial services exports to the EU, which will boost the input tax recovery position of the UK financial services industry.

Cross border disputes

The impact of Brexit on cross-border disputes will be felt most heavily in relation to procedure, rather than substantive law.

What has changed?

Now that the transition period is over, EU regulations which operate on a reciprocal basis, such as the EU Service Regulation, have been revoked. Matters will now be determined by a combination of existing common law and statute and the following conventions which the UK intends to continue to participate in:

- The Hague Convention on Choice of Court Agreements 2005 in relation to jurisdiction and enforcement of judgments where parties have made an exclusive choice of court agreement.
- The Hague Service Convention in relation to service of proceedings.
- The Hague Evidence Convention in relation to requests for the taking of evidence between the UK and other contracting states.
- The 2007 Lugano Convention in relation to rules on jurisdiction and enforcement of judgments (though the UK has not yet completed the process of formally acceding to the Convention, meaning its provisions will not apply for proceedings started after 31 December 2020, and before the UK's accession). The European Commission has opposed the UK's accession to the Convention, presenting a significant hurdle. A separate bilateral agreement governs disputes between Norway and the UK, but it is not yet clear what – if any – long term regime will govern proceedings with other European countries commenced after the end of the transition period.

The UK has also decided to retain in domestic law Rome I and Rome II, which contain the rules to establish which law applies to the parties' obligations under contract and tort respectively. These regulations will also apply when determining the validity and enforceability of governing law clauses.

For proceedings commenced before 31 December 2020, transitional provisions apply across many areas including service, jurisdiction and enforcement, meaning that relevant EU law continues to apply even where the regulations have otherwise been revoked.

How will Brexit affect the courts?

Brexit will have little impact on the substance of English contract law, which is largely based on English common law rather than being derived from the EU. UK courts can no longer make a preliminary reference to the CJEU for a final interpretation of EU law where relevant. Where UK courts are deciding on matters relating to retained EU law, they will continue to be bound by decisions and principles laid down by the CJEU prior to 31 December 2020 (though the Supreme Court and Court of Appeal may depart from these decisions and principles where they consider it appropriate to do so).

UK courts will not be bound by decisions or principles of the CJEU laid down after 31 December 2020, but they may 'have regard' to them where they consider it appropriate to do so. It remains to be seen how the courts will interpret what is meant by 'appropriate', but it seems unlikely that we will see the courts departing radically from EU law, at least in the first instance. There may nevertheless be uncertainty ahead for those involved in disputes where unsettled issues of EU law are significant.

Key considerations

Those involved in existing cross-border proceedings should check which transitional provisions apply to them, and bear in mind that whilst such provisions may apply at one stage of proceedings (e.g. service), they may not apply to later stages (e.g. enforcement).

Going forward, the loss of simplified EU-wide processes such as small claims procedures and European payment orders may make the cost of recovering small sums in Member States prohibitively expensive. Other practicalities will also need to be considered for new proceedings, such as the potential need to request an extension of time for serving a claim form, where the loss of EU regulations means permission to do so will now be required from the court.

Immigration

Following the end of the transition period, EEA/Swiss nationals and their family members now no longer have the automatic right to travel to, live and work in the UK under free movement.

EEA/Swiss nationals who had been residing in the UK prior to 31 December 2020 and wanted to continue to lawfully work in the UK were able to apply for status under the EU Settlement Scheme. This includes EEA/ Swiss nationals already with documents certifying permanent residence, who needed to re-apply for new documentation.

The deadline for applications under the EU Settlement Scheme was 30 June 2021. 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 under the EU Settlement Scheme provided the relationship existed on 31 December 2020 and it continues to exist when the family members come to the UK.

EEA/Swiss nationals looking to move to the UK for the first time from 1 January 2021 will need to apply for and obtain the appropriate visa for their reason for travel under the UK's Immigration Rules.

If you have staff working in Europe, please read our Go-to Guides, part 1 and part 2. And for more information, please visit bateswells.co.uk/services/immigration.

Right to work checks

All EEA/Swiss nationals were able to rely on their EEA/Swiss passports to prove their right to work until 30 June 2021.

However, from 1 July 2021 it will be mandatory for EEA/ Swiss national new hires to have an immigration status to prove their right to work in the UK. It may be possible for them to prove their right to work through an online share code.

Right to work checks are not retrospective and employers will not need to rerun checks on staff whom they have hired prior to 1 July 2021 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.

A Transitional measure has been introduced to assist an employer who discovers that an EEA/Swiss national employee did not make an application for status under the EU Settlement Scheme before the 30 June 2021 deadline. Until 31 December 2021, employers will not need to cease employment at the time they identify an EEA/Swiss national employee without status. Instead the employer should advise that the employee makes an application under the EU Settlement Scheme within 28 days and provide a Certificate of Application. A right to work check using the Employer Checking Service can then be undertaken.

Professionals and recognition of qualifications

Prior to the UK leaving the EU, a reciprocal framework of rules was set up by the EU Directive 2005/36/EC ("the 2005 Directive"), as implemented by the European Union (Recognition of Professional Qualifications) Regulations 2015 ("the 2015 Regulations"), which allowed for the recognition of professional qualifications obtained outside of the UK.

As from the end of the transition period, the UK ceased to be subject to the 2005 Directive. However, to ensure the protection of EEA, Swiss and UK nationals who have gained certain rights from the 2005 Directive, provisions for the recognition of professional qualifications have been adopted by the UK.

A new temporary general system of recognition for EEA and Swiss qualifications came into effect on 1 January 2021. Under the amended 2015 Regulations, regulatory bodies in the UK are still under an obligation to consider applications for recognition of EEA and Swiss professional qualifications, but the obligation is limited to qualifications that are comparable to the qualification requirements and standards in scope, level and content in the UK. It is important to note that some of the previous arrangements aiding freedom of movement of persons, services and establishment have been removed from the amended 2015 Regulations. For example, the basis of eligibility is now the qualification itself and where it was obtained, which means that the provisions do not apply to applicants on the basis of their nationality.

Moreover, certain professions, including health care and social care professions, architects, veterinary surgeons, and farriers, have been removed from the scope of the amended 2015 Regulations. Separate regulations have been introduced as well as existing legislation amended to ensure that a similar system of recognition for EEA and Swiss qualifications is in place for these specific professions for a specified period.

It is not clear yet what requirements EU member states will set for professionals with UK qualifications if they wish to have their qualification recognised in an EU member state. However, it is possible that additional examinations or training might be required.

On 12 May 2021, the Department for Business, Energy & Industrial Strategy issued a policy paper, the summary of responses received to its 2020 consultation and guidance for regulatory and professional bodies on arrangements to facilitate the mutual recognition of professional qualifications.

The proposed framework focuses on meeting skills demand, maximising international opportunities, and creating a navigable system for professionals.

For more information on the proposed framework, please see the policy paper here. For more information, please see this guidance on arrangements to facilitate the recognition of professional qualifications, as well the responses to the consultation here.

For more information on the new temporary general system and the relevant arrangements for specific professions, please see the government guidance for regulatory bodies here.

Get in touch

If you have any questions about any of the topics raised in this guide, we'd be happy to help. Please email **hello@bateswells.co.uk**, or get in touch with one of our people directly **here**.

About Bates Wells

Making a profit is core to all businesses but our goal is to combine this with a real social purpose. Our values are pivotal to us, they shape our decisions and the way we live and work.

We focus on positive social impact as much as we focus on being a successful law firm. Our top tier legal advice is coupled with a real desire to drive change and we were the first UK law firm with B Corp certification, awarded to businesses that balance purpose and profit.

Today, our clients are diverse –from corporate household names, to public bodies, to start-ups. We're also the firm of choice for thousands of charities and social enterprises. We continue to lead the market we helped to shape.

Bates Wells challenges what is possible in legal expertise delivery.