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Brexit FAQs

Entering the transition period – 31 January 2020



What's the latest on Brexit?

On 31 January 2020, the UK will formally leave the European Union, after over 40 years of membership. The UK's relationship with the EU will no longer be governed by the EU Treaties, but instead by the terms of the Withdrawal Agreement agreed between the UK and the EU in late 2019. Following that agreement, the UK will be in a "transition" period, which commences the moment the UK leaves the EU and is currently set to end on 31 December 2020.

Under the terms of the transition, most EU law continues to apply to the UK and in the UK and continues to be interpreted and applied as if the UK were still an EU Member State. This means that during the transition period, from the perspective of business not much will change in terms of the UK's relationship with the EU. For many, it will feel as if the UK has not left.

But the UK will have left the EU. At the end of the transition period, currently 31 December 2020, there are likely to be significant changes to the UK's business environment.

During the transition period itself, the UK will no longer participate in EU governance and decision-making and will instead focus in 2020 on the negotiations relating to its future relationship with the EU, which the UK Government hopes to have in place by the end of the year. Many believe this to be an extremely demanding timetable, but the UK Government insists it will not request an extension to the transition period under any circumstances. The UK will also continue engaging with the negotiations with other countries, including replacing various EU free trade agreements by the end of the transition period.

To keep up to date with new developments, visit our Brexit hub and subscribe to our Brexit bulletin: hoganlovells.com/brexit

It is vital that businesses monitor the negotiations closely and remain engaged with the process. The decisions that will be taken during the course of the negotiations will impact the shape of the UK economy for years to come. We, Hogan Lovells, are uniquely placed to help our clients over the coming months to prepare for the various potential outcomes.

This document provides a brief overview of the impact of Brexit on your business on 31 January 2020 and beyond.

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What happens on 31 January 2020?

At 11pm (UK time) on 31 January 2020, the UK will formally leave the EU. The UK's relationship with the EU will no longer be governed by the EU Treaties, but instead by the terms of the Withdrawal Agreement agreed between the UK and the EU.¹

In accordance with Articles 126-132 and Annex VII of the Withdrawal Agreement, the UK will enter a transition period (also referred to as the “implementation period”), which starts at 11pm on 31 January and is currently set to end on 31 December 2020.

How does the transition period work?

In summary, Articles 126-132 of the Withdrawal Agreement provide that, for the duration of the transition period, **most**² of EU law:

- a) continues to apply to the UK (i.e. as a State);
- b) continues to apply in the UK (i.e. EU law will continue to be directly effective in UK law and directly enforceable in the UK courts);
- c) shall produce in respect of and in the UK the same legal effects as those that it produces in the EU and its Member States; and
- d) shall be interpreted and applied (by the UK, the EU and the remaining EU Member States) in accordance with the same methods and general principles as those applicable in EU law.³

Effectively, the UK is treated – for almost all intents and purposes – **as if** it remains an EU Member State during the transition period.

What does this mean for businesses?

For businesses, this means that, during the transition period:

- a) almost all EU law continues to apply in respect of businesses operating in the UK as it did before Brexit;
- b) the UK is still treated as a Member State – and is not a third country – for the purposes of most EU regulatory regimes;
- c) licences and other authorisations provided pursuant to EU law and/or by EU bodies continue to be valid in the EU and the UK; and
- d) EU institutions and other bodies (including the Court of Justice of the EU (“CJEU”), the Commission and EU agencies) continue to have jurisdiction in the UK over any proceedings and administrative processes commenced before the end of the transition period and their judgments and decisions made before the end of the transition period are binding on and in the UK.

1. Available here: <https://www.gov.uk/government/publications/new-withdrawal-agreement-and-political-declaration>

2. Unless otherwise provided by the Withdrawal Agreement.

3. In particular, unless otherwise provided in the Withdrawal Agreement, during the transition period, any reference to “Member State” in EU law applicable pursuant to the transition arrangements, including as implemented and applied by Member States, shall be understood as including the UK.



You say “almost all” EU law continues to apply, how do I determine whether a specific EU Regulation continues to apply during the transition period?

The transition arrangements in the Withdrawal Agreement state that all EU law continues to apply in the transition period “unless otherwise provided in the Withdrawal Agreement”. Therefore, it is necessary to check whether the specific EU Regulation is listed in the Withdrawal Agreement as one that does not apply during the transition period.

The relevant provisions to check are Articles 126-132 and Annex VII of the Withdrawal Agreement.

Does anything change in terms of the UK’s relationship with the EU on 31 January 2020?

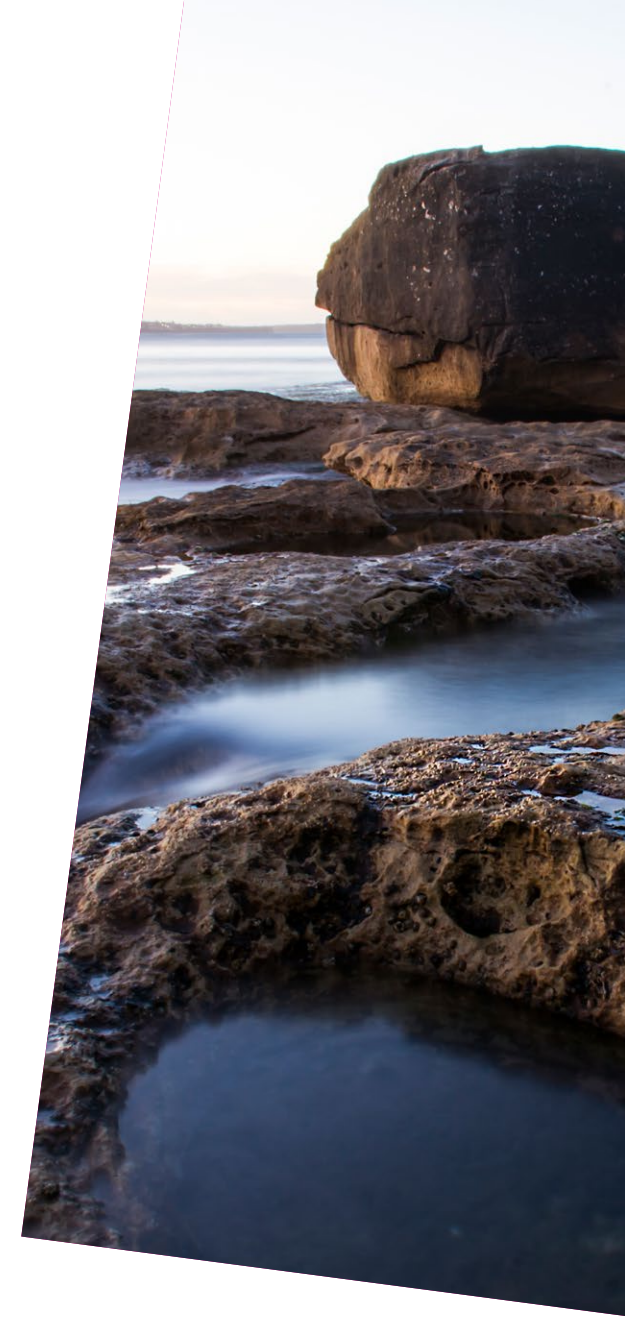
While it is true that, in practice, during the transition period not much will change and it will feel for many businesses like the UK has not yet left the EU, the UK will have left and this will mean fundamental and immediate changes to the UK-EU relationship.

- So far as the UK-EU relationship is described in legal documents, such as contracts, it will be important to check that the description is still valid: EU law no longer applies to and in the UK during the transition period **by virtue of its membership of the EU**, but rather by virtue of the Withdrawal Agreement which effectively treats the UK as if it remains a Member State of the EU during this period.
- The UK no longer has the right to participate in EU governance and decision-making. This means no EU Commissioner, no MEPs, no seat on the Council of Ministers and no participation in the decision-making of EU agencies.

This could impact on the application of EU law by those bodies. For example, where a particular step in an EU regulatory process would previously have been carried out by a UK body on behalf of the EU or pursuant to EU law, this may no longer be the case.

- While, as stated above, the UK will continue to be treated as a Member State (and therefore **not** as a third country) for the purposes of many EU regulatory regimes during the transition period, the UK will be treated as a third country **for the purposes of its negotiation of a free trade agreement with the EU**. This is because, as a matter of EU law, the EU can only negotiate free trade agreements with countries that are not EU Member States.
- The EU has entered into a substantial number of international agreements with third countries on a range of issues on behalf of its Member States and to which those Member States are only party by virtue of EU membership. Under the terms of the Withdrawal Agreement, the EU and the UK have agreed to continue to treat the UK as bound by these agreements as between the UK and the EU. However, the EU cannot bind the third countries with whom it has entered into these agreements. Therefore it is important to note that it is possible that these third countries may not agree to treat the UK as a party to these agreements after 31 January 2020.⁴ An important example of this is the Lugano Convention, which concerns jurisdiction and the enforcement of EU judgments in Iceland, Switzerland and Norway.

4. A footnote to Article 129 of the Withdrawal Agreement notes that “The Union will notify the other parties to these agreements that during the transition period the UK is to be treated as a Member State for the purposes of these agreements”.



What happens at the end of the transition period?

The transition period is currently due to end at 11pm on 31 December 2020. The Government intends to negotiate a new free trade agreement with the EU during the transition period that will be ready to come into effect on 1 January 2021.

The Withdrawal Agreement provides an option to extend the transition period by either one or two years (until 31 December 2021 or 2022, respectively). However, the UK Government has ruled out extending the transition period. The option to extend the transition period provided under the Withdrawal Agreement lapses at 11pm on 30 June 2020. Therefore, after 30 June 2020, if the option is not exercised, there will be no legal mechanism available to extend the transition period. However, it is possible that the UK and EU could agree to do so outside the currently available mechanisms.

In the event that no new free trade agreement is agreed before 31 December 2020 and no extension of the transition period is agreed, the transition period will end and the UK will have no international agreement governing its ongoing relationship with the EU.

It is important to note that reaching the end of the transition period without a new agreement with the EU governing the ongoing UK-EU relationship would be different from a no-deal Brexit prior to the entry into force of the Withdrawal Agreement (if one had come to pass). This is because certain provisions of the Withdrawal Agreement, such as Part Two of the Agreement on Citizens' Rights (Articles 9-39 of the Withdrawal Agreement) and Part Three on Separation Provisions (Articles 40-125 of the Withdrawal Agreement), continue to apply beyond 31 December 2020.

In terms of proceedings before the CJEU and certain EU administrative procedures ongoing at the end of the transition period, the Separation Provisions provide as follows.

In terms of the CJEU:

- The CJEU continues to have jurisdiction in any proceedings brought by or against the UK before the end of the transition.
- The CJEU continues to have jurisdiction to give preliminary rulings on requests from UK courts made before the end of the transition.
- Judgments of the CJEU handed down before the end of the transition (or judgments in respect of proceedings ongoing at the end of transition) shall be binding on and in the UK.

In terms of other EU bodies:

- The institutions, bodies, offices and agencies of the EU shall continue to be competent for administrative procedures which are initiated before the end of the transition concerning (a) compliance with EU law by the UK or by any natural or legal person residing or established in the UK; (b) compliance with EU law relating to competition in the UK. "Initiated" means the point at which it has been formally registered with the relevant EU body (although see Article 92 of the Withdrawal Agreement for specific exceptions to this for state aid and competition law cases and certain investigations by ESMA).
- The EU will provide the UK with a list of all individual ongoing procedures within three months after the end of the transition period.
- Decisions adopted by institutions, bodies, offices and agencies of the EU before the end of the transition (or decisions in respect of procedures that are ongoing at the end of the transition) shall be binding on and in the UK. Jurisdiction to review the legality of these decisions remains with the CJEU.



What happens at a domestic legal level to give effect to Brexit on 31 January 2020?

From the perspective of the EU and the remaining EU Member States, the Withdrawal Agreement automatically forms a part of the EU law “acquis”, and therefore will be implemented into the national law of EU Member States in the normal way.

From the perspective of the UK, in order to give effect to the Withdrawal Agreement in UK law, the UK Parliament has passed legislation implementing the agreement into UK law: the EU (Withdrawal Agreement) Act (the “2020 Act”).

The 2020 Act amends the EU (Withdrawal) Act 2018 (the “2018 Act”), which the Government passed in 2018 to prepare the UK for a potential no-deal Brexit.

The combined effect of the 2020 Act and the 2018 Act is, in summary, as follows:

- a) The European Communities Act 1972 (the “ECA 1972”), the domestic legislation through which EU law was given direct effect in UK law during the period of the UK’s EU membership, is repealed on 31 January 2020 (defined as “exit day”) (s. 1 of the 2018 Act);
- b) Notwithstanding the above, s. 1A of the 2018 Act, as amended by the 2020 Act, provides that, from 31 January 2020:
 - i. the ECA 1972 “continues to have effect in domestic law” “despite the repeal of the [ECA 1972] on exit day by section 1”. This is an unusual mechanism that effectively repeals but preserves the effect of the ECA 1972, as a form of “zombie legislation”.
 - ii. The definition of the “EU Treaties” in the ECA 1972 is amended to include the provisions of the Withdrawal Agreement concerning the transition period and the definition of “Member State” is amended to include the UK for the purposes of the transition period.
 - iii. The above provisions are repealed without further enactment on “IP completion day” (short for “Implementation Period completion day”), currently defined as 11pm (UK time) on 31 December 2020. This means that domestic law assumes that the transition period ends, and therefore EU law will cease to apply to and in the UK, on 31 December 2020.



c) On IP completion day (i.e. currently 31 December 2020):

- i. The 2018 Act will replicate much of EU law, “so far as it is operative immediately before 31 December 2020”, in UK law as “retained EU law” (see ss. 2-4 of the 2018 Act).
- ii. The Statutory Instruments enacted under s. 8 of the 2018 Act will come fully into force, amending retained EU law to deal with deficiencies arising from the UK’s withdrawal from the EU so as to ensure that retained EU law functions appropriately in the UK.

d) The combined effect of (c)(i) and (c)(ii) above is that, on 31 December 2020:

- i. From a UK perspective, retained EU law (which is a copy and paste of EU law as it applies immediately before the end of the transition period, subject to amendments made by Statutory Instrument) will effectively replace the substantive rules currently contained in EU law. This means much of the substance of these rules will remain, although it will now operate in a new context whereby the UK is no longer participating in the EU and the relationship between retained EU law and other UK law is governed by the 2018 Act (see in particular, ss. 5-7 and Schedule 1 of the 2018 Act).
- ii. From an EU perspective, notwithstanding the UK’s replication of much of the substance of EU law in UK law, the EU and its Member States will treat the UK as a third country (i.e. no longer as a Member State of the EU) and, therefore, any rights, powers, liabilities or obligations that persist in the UK and in respect of UK businesses by virtue of EU law (e.g. EU licences and authorisations) will cease to be effective.

Note that, if the UK and the EU agree to extend the transition period, the definition of “IP Completion day” will need to be amended in domestic legislation to give effect to this in domestic law.



Will UK judgments still be enforceable in the EU and other third countries after Brexit?

(a) Enforcement of UK judgments in the EU (and EU27 court judgments in the UK) during the transition period

The Recast Brussels Regulation applies to civil and commercial matters and provides that: “A judgment given in a Member State which is enforceable in that Member State shall be enforceable in the other Member State without any declaration of enforceability being required”.

The Recast Brussels Regulation continues to apply in respect of UK court judgments during the transition period by virtue of the Withdrawal Agreement. In particular, during the transition period, references to “Member States” in EU law are to be understood to include the UK. Therefore, during the transition period:

- UK judgments will continue to be enforceable in the courts of EU Member States; and
- judgments of an EU27 Member State will continue to be enforceable in the UK courts.

(b) Enforcement of UK judgments in third countries during the transition period

During the period of the UK’s membership of the EU, the enforcement of UK judgments in certain third countries has been governed by:

- the Lugano Convention, governing civil judicial cooperation between the EU and Norway, Switzerland and Iceland; and
- the Hague Convention on Choice of Court Agreements 2005, governing civil judicial cooperation between the EU, Singapore, Mexico and Montenegro.

Under Article 129 of the Withdrawal Agreement, the EU and the UK have agreed to continue to treat the UK as bound by all international agreements entered into by the EU with third countries on behalf of the UK. This means that the UK will continue to be bound to enforce, for example, Swiss judgments pursuant to the Lugano Convention.

However, the Withdrawal Agreement only applies as between the UK and the EU and does not bind third countries. A footnote to Article 129 of the Withdrawal Agreement notes that “The Union will notify the other parties to these agreements that during the transition period the UK is to be treated as a Member State for the purposes of these agreements”. However, there is no requirement on the part of those third countries to agree, or even respond, to such a notification.

Therefore, it is currently uncertain whether third countries that are party to such agreements will continue to treat the UK as a party to such agreements during the transitional period. In the context of the Lugano Convention, for example, it is unclear whether a Swiss court will continue to apply the Lugano Convention in respect of a UK judgment during the transition period.

If such international agreements do not apply, a UK judgment would have to be enforced in the third country pursuant to that country’s domestic law. Parties seeking to enforce a judgment will need to take local law advice on the mechanisms of enforcement in the relevant third country.



(c) Enforcement of UK judgments in the EU (and EU court judgments in the UK) at the end of the transition period if no future agreement is reached

In the event that no new free trade agreement is agreed before 31 December 2020 and no extension of the transition period is agreed, Article 67(2)(a) of the Withdrawal Agreement provides that the Recast Brussels Regulation:

- continues to apply in respect judgments made in legal proceedings instituted before the end of the transition period.
- does not apply in respect of judgments made in legal proceedings instituted after the end of a transition period.
- “instituted” has the same meaning as in the Recast Brussels Regulation and varies depending on the individual State concerned – in the UK it means when the claim was first issued.

This means that, in respect of a UK judgment in legal proceedings instituted after the end of the transition period (and therefore to which the Recast Brussels Regulation does not apply), parties seeking to enforce such judgments in an EU Member State will need to do so pursuant to the domestic law of the relevant Member State. Equally, the enforcement of EU27 judgments initiated after the end of the transition period in the UK will be a matter of domestic UK law.

The UK has indicated its intention independently to accede after Brexit to the Hague Convention on Choice of Court Agreements 2005 and the Lugano Convention, to both of which the EU is a signatory. For more information on the potential effect of this, please see here.⁵

(d) Enforcement of UK judgments in third countries at the end of the transition period if no future agreement is reached

In the event that no new free trade agreement is agreed before 31 December 2020 and no extension of the transition period is agreed, a UK judgment will need to be enforced pursuant to the domestic law of the third country concerned, subject to any international agreement to the contrary.

The UK has indicated its intention independently to accede after Brexit to the Hague Convention on Choice of Court Agreements 2005 and the Lugano Convention. For more information on the potential effect of this, please see here.⁶

(e) Will awards issued by arbitral Tribunals sitting in the UK still be enforceable in the EU and other third countries (i) during, and (ii) at the end of the transition period if no future agreement is reached?

Yes. The New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards, to which the UK and all EU Member States are parties, is not affected by Brexit. Accordingly, awards issued by arbitral Tribunals sitting in the UK will continue to be enforceable in the court of the EU Member States and awards issued by arbitral Tribunals sitting in an EU Member State will continue to be enforceable in the UK courts in accordance with the terms of the New York Convention. Brexit will also have no effect on the way in which the New York Convention operates between the UK and other third countries who are party to the Convention.

For more information, please check out our [Brexit Hub](#) or contact one of the [Brexit Taskforce](#).

5. The latest view: Enforcement of judgments post-Brexit in the event of a No Deal Scenario
6. The latest view: Enforcement of judgments post-Brexit in the event of a No Deal Scenario



Key Brexit legal instruments

The Withdrawal Agreement

The international agreement between the UK and the EU under Article 50(2) of the Treaty on European Union that makes provision for the UK's withdrawal from the EU on 31 January 2020. This is not UK legislation but is implemented into UK law by the European Union (Withdrawal Agreement) Act 2020.

European Union (Notification of Withdrawal) Act 2017

The legislation that, following the Miller litigation, was required to give the Prime Minister the power to notify the EU of the UK's intention to leave the EU under Article 50 of the Treaty on European Union.

European Union (Withdrawal) Act 2018

The 2018 Act: the key piece of post-Brexit legislation, soon to be amended by the European Union (Withdrawal Agreement) Act 2020, which (as amended) will (a) provide the domestic legal basis for the transition period under the Withdrawal Agreement; (b) provide the legal mechanism for the transposition of EU law into UK law as retained EU law at the end of the transition period; and (c) govern the interaction between retained EU law and other UK law.

European Union (Withdrawal) Act 2019

The original "Benn Act", which obliged the Government to request an extension of the Article 50 period in the event that the Withdrawal Agreement was not agreed before 29 March 2019. Now only of historical interest.

European Union (Withdrawal) (No. 2) Act 2019

The second "Benn Act", which obliged the Government to request a further extension of the Article 50 period in the event that the Withdrawal Agreement was not agreed before 31 October 2019. Now also only of historical interest.

European Union (Withdrawal Agreement) Act 2020

This act implements the Withdrawal Agreement into UK law, including by amending the 2018 Act.

Statutory instruments with the words "(EU Exit)..." Regulations" in the title

Statutory Instruments, adopted under s. 8 of the 2018 Act, which amend retained EU law in order to deal with deficiencies arising from the UK's withdrawal from the EU. These Statutory Instruments will not come into force until the end of the transition period, currently scheduled for 31 December 2020, and (some or all of which) may never come into force if the need for them is negated by a future free trade agreement.