

# Brexit: Commercial

## In the commercial law field, contract audits are advisable and the application of the E-Commerce Directive will be impacted.

The following analysis looks at potential consequences based upon the UK having left the EU on 31st January 2020 but subject to the transition or 'implementation period' set out in the Withdrawal Agreement negotiated by the Johnson government with the EU. During the implementation period the Withdrawal Agreement (and the UK Withdrawal Acts implementing it) provide for EU law to apply in the UK as if the UK is still a Member State, so nothing really changes. But at the end of that period – currently expected to be 11pm on 31st December 2020 – the full legal implications of the UK leaving the EU take effect.

### Contracts & E-Commerce

- Brexit will have a very limited effect upon English contract law principles, which have been largely unaffected by EU intervention
- But there is the potential for Brexit to generate problems with the interpretation of contract provisions referring to the EU or EU law, as well as to have commercial or profitability impacts
- UK consumer protection law in respect of contracts has been considerably amended in line with EU harmonization Directives and case-law, but this is now embodied in UK legislation and regulatory arrangements and will be largely unaffected by Brexit (unless/until the Government decides to make changes)
- Certain important aspects of the EU E-Commerce Directive will no longer apply to UK-based information service providers from the end of the implementation period
- The timing of these E-Commerce Directive changes (we use the phrase 'implementation period end date' when referring to it below) is expected to be from 11pm on 31st December 2020, as this is the date that the Government has set in its Withdrawal Act. There is just a possibility, however – depending upon how trade negotiations go between the UK and EU - that the implementation period end date could be pushed back, or even that no trade deal is reached. If so, we will update these pages to reflect the potential consequences.
- See the 'Dispute Resolution' section for separate comments on Jurisdiction, Jurisdiction Clauses, Applicable Law and Enforcement

### What are the key changes and what actions can be taken?

- **Action:** conduct a contract audit to identify problem provisions, and consider discussing with counter-parties in advance of Brexit whether to amend problematic drafting or to put in place new contractual provisions
- Brexit could have commercial and profitability implications for individual contracts as a result of impacts upon exchange rates, tariffs, free movement of people & goods, etc
- **Action:** the courts will often be slow to intervene based upon arguments of force majeure or frustration, but consider taking legal advice where such issues affect high value contracts
- From the 'implementation period end date' (see above), information society service providers established in the UK will no longer be able to rely upon the regime established by the EU E-Commerce Directive – for example its 'country-of-origin principle', prior authorisation scheme and basic information requirements
- **Action:** such UK-established service providers will instead fall under the individual national rules of each of the 27 remaining Member States of the EU when providing services to customers in those countries, and so country-by-country compliance advice will potentially be needed; (likewise, EU-based service providers will have now to comply with UK rules in addition to those of their EU country-of-origin)
- The limitations on liability set out in the E-Commerce Directive will also not apply to UK-established service providers after the implementation period end date
- **Action:** the UK government has stated it will ensure that UK rules 'continue to align with the Directive', including in this respect
- **Action:** UK-established Information service providers for whom the applicability of the 'country-of-origin principle' and limitations on liability are important may want to consider whether they can benefit from continued application of the Directive based upon an alternative 'establishment' in a continuing EU member state
- UK-based Digital service providers\* offering marketplace, search engine or cloud computing services online in the EU (\*those of the requisite size under the Network & Information Systems Directive) will no longer benefit from being based in the EU after the 'implementation period end date' (see above)
- **Action:** such service providers will then be obliged to designate a representative in one of the EU Member States served
- **Action:** likewise, EU-based providers of such services will have to appoint a representative in the UK, confirm this in writing to the Information Commissioner's Office, and comply with the UK's NIS Regulations

- Brexit could raise tricky questions of interpretation of contracts, for example as a result of references to 'the EU' or 'the EEA' as a territory (do they continue to cover the UK?), or requirements of compliance with EU law



## For more information



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