

Brexit: Commercial

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

The following analysis looks at the consequences of 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 transition period the Withdrawal Agreement (and the UK Withdrawal Acts implementing it) provide for EU law to continue to apply in the UK as if the UK is still a Member State, so nothing has yet really changed. It is at the end of the transition period that the full legal implications of the UK leaving the EU take effect.

The transition period is expected to end at 11pm on 31st December 2020, as this is the date and time set in the Withdrawal legislation, and the Government has categorically ruled out any further extensions. This is therefore the date referred to below from which key changes are expected to take place. There is a technical possibility, however – which would require UK legislation and the agreement of the EU – that the transition period end date could be pushed back (for example, were the Government and EU to decide that the Covid-19 pandemic justified a change in policy). If that were to occur, we will update these pages to reflect the potential consequences. However, it seems unlikely and at the time of writing, the prospects for a trade deal with the EU are uncertain.

Contracts & E-Commerce

- Brexit will have a very limited effect upon English contract law principles, which have been largely unaffected by EU intervention
- However, 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 harmonisation 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, but such changes would be subject to public consultation and parliamentary scrutiny)
- Certain important aspects of the EU E-Commerce Directive may no longer apply to UK-based information service providers from the end of the transition period. The government has recently updated its guidance in this area
- 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?

- 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 to requirements of compliance with EU law
 - **Action:** conduct a contract audit to identify problem provisions, and consider discussing with counter-parties 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 end of the transition period, information society service providers established in the UK but not in the EU 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, once the transition period ends, to service providers established in the UK but not in the EU
 - **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 EU '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 end of the transition period
 - **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

For more information



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