

## ↓ Key Points

- Brexit delayed until 31 October 2019
- Review live international contracts
- Review personal data flows in and out of the EU
- Understand the implications for UK nationals working in the EU
- Educate staff

## Guidance on a No-deal Brexit

### Background

Although the UK was originally expected to leave the EU on 29 March 2019, the exit date has been postponed due to the decision by the UK and EU to extend the Article 50 Notice Period to help ensure an orderly departure and avoid a no-deal Brexit scenario. The UK will now leave the EU on 31 October 2019, unless there is a further extension to Article 50 or a new agreement can be secured with the EU, in which case the exit date may be earlier or later.

If no deal is reached or accepted, the picture is much more uncertain than if a deal is agreed. The aim of this guidance is to highlight the key issues in the no-deal technical papers issued by the government, relevant to professional recruitment companies and to make recommendations on actions you should be considering.

The technical notes published by the EU Commission and Department for Exiting the European Union can be viewed [here](#) and [here](#).

### The Withdrawal Agreement Bill

The EU have repeatedly stated that the Withdrawal Agreement between the EU and UK is not open to negotiation and that the Irish Backstop – opposed by significant elements within the Conservative Party and by the Democratic Unionist Party – cannot be changed.

Once a new Prime Minister is in situ, in the event the Withdrawal Agreement Bill is eventually passed, it will bring into legal effect the UK's exit from the EU. Outside of Westminster, the European Parliament holds a simple majority vote on the Withdrawal Agreement. If the European Parliament consents to the Withdrawal Agreement, the Council of the European Union (Council) (excluding the UK) holds a qualified majority vote on the Withdrawal Agreement and concludes the UK's withdrawal on behalf of the EU.

Once the UK leaves the EU, formal negotiations on the future UK-EU relationship will start under Article 218 of the Treaty on the Functioning of the European Union (TFEU), based on the content of the political declaration made before withdrawal. It should be noted that while the Withdrawal Deal is no longer open to negotiation, the EU have expressed a willingness to discuss the wording of the political declaration on the future relationship and this may continue to evolve.

During the transition period, most EU law (including as amended or supplemented) will continue to apply to the UK. The UK will continue to participate in the EU Customs Union and Single Market. The Withdrawal Agreement will also preserve many of the existing rights of UK citizens resident in an EU member state and vice versa post transition.

### Implication of the Conservative leadership election

The Conservative Party is in the process of electing a new leader who, once

chosen, will succeed Theresa May as Prime Minister. There are currently several high-profile candidates in the leadership contest and while there is always the possibility of an upset, the clear front runner is former Foreign Secretary, Boris Johnson, who resigned from the May Government due to his opposition to her Withdrawal Deal.

Mr Johnson currently commands the support of many of his Parliamentary colleagues – far more so than his leading opponents - and he is also the overwhelming favourite amongst the grass roots of the Party, who will ultimately choose the next leader. He has said he will seek to re-open the Withdrawal Agreement with the EU and negotiate the removal of the Irish Backstop or attempt to secure a time-limited expiration. However, the EU leadership have so far said that a renegotiation is not possible, and Mr Johnson has outlined no strategy for achieving what Mrs May failed to do.

If Mr Johnson does commit to a managed No Deal, it remains highly unlikely that the UK will leave on 31 October as a further extension to Article 50 will likely be required to deliver a managed no-deal Brexit. However, within Parliament itself there exists no majority for No Deal, which in turn raises significant constitutional questions around whether Mr Johnson, as Prime Minister, could even deliver a no-deal Brexit. That said, a unilateral extension of Article 50 is not within the gift of either Parliament or the Prime Minister and must be agreed by the EU. This means that unless a revised Withdrawal Agreement can be secured by Mr Johnson and then approved by Parliament, or Article 50 is successfully extended to facilitate a managed no-deal Brexit, the default position remains that the UK will leave the EU on 31 October 2019.

## The EU Position

A No-Deal Brexit means the UK will leave the EU and become a third country without any transitional arrangements. All EU law would cease to apply to the UK and there would be no transition period, or reciprocal agreement guaranteeing citizens' rights as provided for in the rejected Withdrawal Agreement. In April 2019, outgoing EU Commission President Junker, outlined to the European Parliament his expectations in the event of a no-deal Brexit.

He argued that the EU will require the UK to address three key areas before opening negotiations on the future trading relationship. These include:

- **Protecting and upholding the rights of citizens who have used their right to free movement before Brexit.**
- **Honouring the financial obligations which the UK has made as an EU member state.**
- **Preserving the letter and spirit of the Good Friday Agreement and peace on the island of Ireland, as well as the integrity of the single market.**

The UK has previously committed to unilaterally safeguard the rights of EU Citizens in the event of a No Deal, and to honour the UK's financial commitments to the EU (although this latter point may change depending on who succeeds Theresa May as Prime Minister).

However, the remaining sticking point is the Northern Ireland Backstop – which the EU insists is necessary to safeguard the Good Friday Agreement and the integrity of the EU Single Market, but which is also currently opposed by the DUP and much of the Conservative Party within the UK Parliament. Therefore, the major issue for any incoming Prime Minister will be whether they can negotiate a change to the Irish Backstop mechanism, making a revised Withdrawal Deal more likely to pass through Parliament. Otherwise – if both sides remain intractable – a no-deal scenario still remains the most likely outcome.

## Impact on Contracts and Enforcement of Contracts

### Key Changes

- The EU's influence over UK contract law is limited. However, a no-deal Brexit is likely to have an impact on issues such as VAT and exchange rates, which all affect a party's commercial bargaining power.
- International contract recruitment often involves the supply of an individual into another country to deliver services e.g. a UK national working in Germany. The individual's right to work in a third-party country will be affected by a no deal, both inside and outside the EU. They will be considered a third-party national in the EU. Outside the EU the individual's right to work, work permit or visa may be conditional on the individual being an EU national.
- The UK would no longer be a part of the EU's civil judicial cooperation framework, which currently includes rules for enforcing court judgements. As a third country, the UK would not benefit from reciprocity with EU countries.
- The UK would repeal most of the existing judicial cooperation rules, including the EU Insolvency Regulations and regulations establishing EU procedures for uncontested debts and claims worth less than €5,000.
- The UK has taken the necessary steps to formally re-join the 2005 Hague Convention on Choice of Court Agreements in its own right and it is anticipated that this will come into force across the UK after exit day. The Convention ensures the effectiveness of choice of court (jurisdiction) clauses made by contracting parties.

### Recommended Actions

- Review the international agreements you are currently working under, whether your own terms or a client version. Are they signed by you and your counter party and do they contain a choice of law and jurisdiction clause? Does the termination clause extend to allow for a non-fault termination following an event such as a no-deal Brexit if a party/the parties can no longer fulfil the contract?
- Review the current state of your international precedents and check that your contracts contain a choice of law and jurisdiction clause.
- Review your live contracts with an end date beyond 31 October 2019, particularly those involving the supply of a UK national into an EU 27 country, an EU national into the UK or the supply of a UK national into a non-EU state. Flag these as an issue with your clients, as potentially the individual will no longer have the right to work in the country in which the services are to be delivered, either in the EU or beyond.
- Consider whether you should enter into shorter term contracts to enable greater flexibility in response to the impact of Brexit.

## Data Protection

### Key Changes

- In the event of a no-deal scenario, with no agreement in place regarding data protection, there would be no immediate change in the UK's data protection standards because the Data Protection Act would remain in place and the GDPR was incorporated into UK law in May 2018 and will consequently also remain in place.

- The legal framework governing transfers of personal data from organisations established in the EU to organisations established in the UK would change. At the point of exit, the UK would allow the free flow of personal data to the EU; however, the flow of data from the EU to the UK would not be guaranteed. The transfer of personal data from the EU to the UK will require an alternative legal basis, such as binding corporate rules or standard contractual clauses. A precedent of the EU model terms can be found on the [APSCo website](#).
- The EU is expected to make an adequacy decision allowing the transfer of personal data to the UK without restrictions; however, the Commission has stated that the decision on adequacy cannot be taken until the UK is a third country.
- If you are based in the UK and not in any other EU or EEA state but you offer goods or services to individuals and companies in the EEA, or you monitor the behaviour of individuals located in the EEA, to comply with the EU regime you will need to appoint a suitable representative in the EEA. This person will act as your local representative with individuals and data protection authorities in the EEA. This is separate from your DPO obligations and your representative cannot be your DPO or one of your processors. You do not need to appoint a representative if you are a public authority or if your processing is only occasional, low-risk and does not involve special category or criminal offence data on a large scale. The EDPB has published [guidelines on territorial scope](#) for public consultation that contain more guidance on appointing a representative.

### Recommended Actions

- If an adequacy decision is not made at the point of exit, you must identify a legal basis for such transfers most likely through standard contractual clauses.
- Review the [Information Commissioner's Office \(ICO\) guidance](#) on a no-deal Brexit.
- If required, contact individuals, such as law firms and accountants, able to act as your representative in the EEA in the event of a no-deal Brexit.

## Business structuring

### Key Changes

- UK citizens and UK registered companies may face restrictions on their ability to own, manage or direct a company registered in the EU. They will be treated as third parties, as any other non-EU entity. Furthermore, some UK companies and LLPs based in certain EU member states may no longer have their limited liability recognised.
- Cross-border mergers involving UK companies will no longer be able to take place under the Cross-Border Mergers Directive.
- EU companies operating branches in the UK will become subject to rules as any other third country, including information and filing requirements.
- UK investors in EU businesses (whether these are individuals, businesses or investment funds) may face restrictions on the amount of equity that they can hold in certain sectors in some EU member states.

### Recommended Actions

- UK companies and LLPs that have their central administration or principal place of business in an EU member state may wish to consider whether they need to restructure to satisfy the requirements for incorporation in that EU member state.



- UK businesses operating in the EU directly or with subsidiary or associated companies should seek professional advice or contact the government of the country in which they operate for more information. They may need to restructure or appoint new company officials.
- Where possible, any mergers currently underway should be finalised ahead of Brexit.

## Accounting and audit

### Key Changes

- The UK will seek to ensure that the same rules and laws will continue to apply using the EU Withdrawal Act. The UK will provide a transition period for audit regardless of a deal until at least December 2020, during which EU auditor registrations will continue to be recognised in the UK.
- There will be additional requirements for the auditing of UK companies operating cross-border.
- Exemptions in the Companies Act 2006 will cease to exist, this includes dormant companies in the UK where an EU parent company prepares group accounts.
- UK businesses with a branch operating in the EU will become third-country businesses and will be required to comply with specific accounting and reporting in the Member State in which they operate.
- UK companies listed on an EU market may also need to provide “additional assurance” that their accounts are compliant with International Financial Reporting Standards, which could impact the compliance statements required within annual accounts to listing authorities.
- There will also be implications for companies delivering auditing services around the recognition of professional qualifications.

### Recommended Actions

- Subsidiaries and parents of EU companies established in the UK should look further at the exemptions in the Companies Act 2006 regarding expected reporting requirements.
- Branches of EU companies in the UK should familiarise themselves with reporting requirements for third countries as these will apply to them in the case of a no-deal exit.
- UK businesses operating in the EU should look into the requirements for third countries in these member states.

## Provision of Services - Legal and admin burden

### Key Changes

- The UK will no longer be part of the EU’s single market and customs union, the four freedoms (the free movement of people, goods, services and capital) will no longer apply and there will no longer be mutual recognition of professional qualifications and regulatory frameworks.
  - UK-EU trade in goods and services will take place under World Trade Organization (WTO) rules and the EU rules that apply to non-EEA countries. The UK and EU WTO schedules will set the baseline for matters such as tariffs and market access and trade in services will also be governed by the national laws and national practices of each EU member state.
  - There may be additional legal and administrative burdens for UK firms operating in the EEA, including requirements based on nationality and re-submitting information to regulators, depending on the
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sector and member state.

- Continuity in the UK's trade with non-EU countries will depend on the government rolling over all the EU's existing trade agreements (and trade-related agreements) by 31 October 2019 and applying them to UK law, if this is legally allowed. The WTO rules and the WTO schedules set out the default position in the absence of any more preferential trade agreements or transitional arrangements.
- Competent authorities in the UK setting licensing requirements for businesses need to be able to regulate EEA service providers as third-country providers and will be responsible for advising businesses on any changes that would be subject to consultation.
- Licensing requirements regulating UK service providers in the EU country as a third-country provider e.g. employment licencing requirements in Germany, will be determined on a country-by-country basis.

### Recommended Actions

- International businesses should be undertaking a full review of their international profile including a country by country review covering their business establishment, operations, staff and business. They need to understand the implications on a country-by-country basis of an immediate switch to WTO rules on 11pm 31 October 2019.

## Visa requirements

### Key Changes

- UK nationals providing services in the EEA, on a short or long-term basis, may require visas and/or a work permit to comply with immigration controls for each member state as a third country.
- EEA nationals providing services in the UK on exit day will be able to continue to work in the UK.
- There may also be issues for professionals providing a service that relies on the recognition of UK qualifications by a member state, if such qualifications have not already been recognised by the EU e.g. lawyers and accountants.
- Switzerland and the UK have agreed a transitional agreement which, in the event of no deal, will allow UK workers to access the Swiss labour market and Swiss workers to access the UK labour market until December 2020.
- The European Commission [has published a breakdown](#), identifying how the individual EU27 countries have begun to implement new legislation for UK residents.

### Recommended Actions

- Review status of UK nationals (and non-EU nationals relying on their UK immigration status) working for you in EEA countries. Take legal advice on actions needed for them to continue to work in the EEA or plan for their return to the UK.
- Review your contractor book - status of UK nationals (and non-EU nationals relying on their UK immigration status) working for you on contract assignments in EEA countries. Take legal advice on actions needed for them to continue to work in the EEA or have mitigation plans in place for termination of contracts ahead of exit day.
- Ensure that steps are taken now to make sure that UK nationals working in the EU under current contracts or those written over coming months are registered with the appropriate in country authorities. Some countries are providing registered UK nationals with temporary rights of residence

and right to work beyond exit day – but only those fully registered as working in country.

- Post exit day be aware that UK nationals may need a work permit to be supplied on a temporary or permanent basis in an EEA country, and vice versa into the UK.

## Professional qualifications

### Key Changes

- The current Mutual Recognition of Professional Qualifications (MRPQ) Directive will no longer apply. This will impact many sectors, including healthcare professionals, teachers and lawyers.
- The UK will ensure that professionals arriving in the UK from the EEA after the exit date will have a means to seek recognition of their qualifications, but recognition will not be automatic.
- Those with an existing recognition decision will not be affected, either in the UK or the EU. Those EEA professionals awaiting a decision on exit day should be able to conclude their applications in line with the MRPQ.

### Recommended Actions

- Further guidance from government is expected.
- Mutual recognition in the EU will depend on the position taken by the EU or may be on a country-by-country basis.

## Employment rights in the UK

### Key Changes

- Employment rights for those working in the UK, even on a temporary basis, will remain unchanged.
- Domestic legislation already exceeds EU law in a number of areas regarding employment protections. Laws currently in force under EU regulation such as the Agency Workers Regulations and TUPE will become UK law on exit day.
- There may also be impacts on workers' rights in relation to employer insolvency.

### Recommended Actions

- Businesses should review their employment contracts and handbooks and update terminology.

## UK Immigration

### Key Changes

In December 2018 the UK Government published a White Paper on the UK's future skills-based immigration system to be introduced following the end of Free Movement post-Brexit. The White Paper has been developed in line with recommendations provided by the Migration Advisory Committee and proposes to:

- Remove the annual cap on the number of work visas issued.
- Widen the skills threshold to include people with qualifications equivalent of A-levels.
- End the requirements for labour market tests by employers wanting to sponsor a worker.

- Consult on a minimum salary requirement of £30,000 for skilled migrants seeking five-year visas.
- Introduce 12-month visas for lower-skilled workers.

In terms of the rights of those EU citizens currently living within the UK, the White Paper proposes that:

- EU citizens who have been living in the UK continuously for five years will be eligible for settled status in UK law.
- EU citizens who arrived before the end of the Implementation Period, but who have not been here for five years, will be eligible for pre-settled status, enabling them to stay until they have accumulated five years, after which they may apply for settled status.
- The Withdrawal Agreement will also allow close family members who live in a different country to join an EU citizen at any time in the future under current rules, if the relationship existed before the end of the Implementation Period.

The Home Office is currently consulting on the proposals detailed in the White Paper and will conduct a year-long engagement programme across the UK to listen to the views of businesses and communities.

### Recommended Actions

- Understand the extent of your business' reliance on EU staff and how you will meet any shortfall of supply after exit day.
- For EEA nationals, the [EU Settlement Scheme](#) is open for EEA nationals and family living in the UK on exit day in the event of a no deal. If there is no deal, the deadline for applying will be 31 December 2020. If there is a managed exit, the deadline for applying is 30 June 2021.
- Currently, the government has given no indication that work permits will be available to the self-employed, employment by a sponsor is likely to be a pre-requisite for a work permit. If your business or your contract business is heavily reliant on staff from outside the UK consider how you could adapt to a new regime.

### Next Steps

APSCo will continue to support our members as Brexit unfolds with our monthly Brexit Journal, further updates to this Guidance and Legal Updates. We will be including Brexit on our agendas as there is greater clarity on steps that all businesses need to take to comply.

Please contact [legalhelpdesk@apsco.org](mailto:legalhelpdesk@apsco.org) about your experiences of responding to Brexit so far and in particular identifying any areas that members may particularly require further assistance with.

#### Disclaimer

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