

# Is your Business Brexit ready?

**BREXIT Guide  
February 2021**





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Love it or loathe it, Brexit is set to impact every business in the UK, with activities, contracts and policies needing to be reviewed to reflect the new relationship with the European Union (EU) and the European Economic Area (EEA). It still remains to be seen as to whether we leave with or without a deal, which is not helpful for businesses wanting to plan ahead. However, as we are fast approaching the Brexit transition deadline of 31 December, the key for any business wishing to navigate Brexit successfully will be to understand your current business position and put together detailed contingency plans.

To assist with this process, Stephens Scown LLP has compiled this guide highlighting the main challenges and opportunities that may lie ahead for your business.

For advice and support on any of the issues raised in this guide please email [enquiries@stephens-scown.co.uk](mailto:enquiries@stephens-scown.co.uk)



## CURRENT POSITION

The UK left the EU on 31 January 2020, and is no longer an EU member state. The UK-EU withdrawal agreement came into force on exit day, following the prior completion of the ratification and notification procedures by the UK and the EU. Under the terms of the withdrawal agreement, a post-Brexit transition period then started and will end at 11pm (UK time) on 31 December 2020. During the transition period, most EU law continues to apply to the UK, and the UK continues to be treated for most purposes as if it were still an EU member state.

After 31 December 2020:

- *Most EU law applicable in the UK as at 31 January 2020 will remain in effect within the UK indefinitely (but on a different constitutional basis, as “retained EU law”) until the government decides to repeal or amend it.*
- *The law relating to the UK’s trading and other relationships with the EU and EU institutions will remain uncertain until the outcome of the negotiations between the UK and the EU.*

If a deal happens (which might be more likely now the ‘level playing field’ issue around competitive advantage appears less of a stumbling block), given the timing, it is possible the transition period will be extended for several months while the detail of how this will work in practice is agreed. This will be resisted by both sides but may end up being a pragmatic way forward. Given the lack of certainty, many businesses are now planning for a no-deal Brexit (as the worst case) just in case.

The advice given in this article is correct as of 16 December 2020. Significant change is expected at the end of the transition period, even if a comprehensive future UK-EU relationship is agreed by then. At this point we still however don’t have a deal and time is running out, so please do check our website for the latest updates.

Read on to get top tips from our multi-disciplinary team of expert legal advisers on preparing your business for the biggest change to rules and regulations since the UK first joined the EC on 1 January 1973.

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## EMPLOYMENT & IMMIGRATION

The rules on who can legally work in the UK are definitely changing from 1 January 2021. This includes the end of free movement of workers from the EU from 11pm on 31 December 2020 (at the end of the Brexit transition period) and the introduction of a new points-based immigration system, which has already been rolled out.

Employers need to ensure they are doing the correct right-to-work checks and following the correct process if bringing workers in from overseas. Businesses which do need to recruit workers from overseas will need to hold a sponsor licence from the Home Office in order to do so. Find out more information [here](#).

Be aware specifically that you’ll need a sponsor licence to employ someone from the EU, Switzerland, Norway, Iceland or Liechtenstein coming to the UK to work from 1 January 2021. Info on the costs and process are [here](#). Our specialist team can help you get a sponsor licence in place.

It’s also worth considering what percentage of your UK workforce is from the EU? It’s important that your European staff know the steps to take to register as an EU citizen working in the UK before and after 31 December 2021. See here for more details. We have been working closely with bigger clients with many multinational staff to ensure all staff have the correct right to work in the UK.

Changes will apply to EU/EEA/Swiss citizens visiting the UK after Brexit. Will this impact your business? Find out more information [here](#).

Future travel to the EU for the servicing of contracts or other purposes may be affected. Government advice on this can be found [here](#). You may need to check the non-EEA visa requirements for the country you are visiting.

The UK Government has issued information for the recognition of professional qualifications that will change after 1 January 2021, which can be found [here](#).



## CORPORATE & COMMERCIAL CONSIDERATIONS

There may be significant short-term disruption to the speed of both export and import of goods. Contracts that are linked to specific delivery or completion dates may be affected by these border delays and fluctuation provisions may need to be incorporated into contracts as well as protections in relation to border issues.

There may be volatility in the stock and currency markets, particularly in the event of a no-deal Brexit. This will have the most impact on companies operating in Europe, in particular those who are party to contracts with fixed exchange rates without sufficient hedging cover. If stock market values dip, as we saw earlier in 2020 with the onset of the pandemic, investment portfolios will suffer again and, as ever, investors will be watching closely to see which sectors and businesses are thriving in a time of potential upheaval.

Foreign direct investment may decrease in the short term, reducing liquidity for UK businesses and making them more reliant on UK-based debt funding. The increased demand may have an impact on the debt finance market in the UK. If your business is considering debt financing in the short to medium term, it may be worth considering taking advantage of the current rates being offered by lenders.

Supply chains are likely to have increased cost by way of demand and tariffs as well as having reduced reliability and increased timescales due to border delays. Businesses have already anticipated this, leading to increased stockpiling, which we have seen before as previous deadlines have approached. It may be prudent to consider the use of consignment agreements to mitigate this. Supply contracts should be reviewed to see whether provision for delays and increased costs should be addressed. We may see an increased use of International Commercial Terms (or Incoterms) in relation to goods traded between the UK and the EU, although businesses should always consider whether they need to use their own bespoke terms when exporting or importing goods. Exporters are already having to address the necessary paperwork that will be required for hauliers to take their goods into the European Union from 1 January (see below for further details).

In the medium term, businesses may consider restructuring to take advantage of the new regulatory landscape. UK businesses may want to establish an EU base to access EU regulatory schemes, but equally, EU businesses may consider establishing a UK base to take advantage of any increased flexibility and beneficial tax regime that may follow independence from EU regulations.

Many corporate finance advisers are anticipating a surge in deal-related activity in relation to owner managed businesses ahead of the next Budget in 2021. Many advisers and business owners fear current rates of Capital Gains Tax (CGT) may be changed as a result of the need to improve the state of the public finances, leading many to do a deal before the next Budget. Whilst uncertainty around the future of CGT may act as a catalyst for deals, this may be hindered by the uncertainty created by Britain's exit from the EU. For example, many sectors could be affected in very different ways depending on (a) whether a deal is made and (b) the terms of that deal. This makes valuations difficult and will present a challenge to those who are tasked with brokering a deal in any sector significantly affected by Brexit.

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## IMPORT & EXPORT TO THE EU

The current Government guidance is as follows:

### Prepare to import goods from the EU to Great Britain from 1 January 2021

From 1 January 2021, you'll need to make customs declarations when you import goods from the EU. This can be done through a third party, such as a courier, or by yourself.

Most declarations are submitted electronically through the Customs Handling of Import and Export Freight (CHIEF) system. If you're going to do this yourself, rather than appoint an agent, you'll need to:

- apply for access to CHIEF
- buy third party software that can submit declarations through CHIEF

There are different rules for:

- carrying merchandise in your baggage with a value less than £873
- importing goods by post
- importing multiple low value parcels on one declaration

You will need to check the specific rules for the types of goods you intend to import.

- You need an Economic Operators Registration and Identification (EORI) number that starts with GB to import goods from 1 January 2021.
- You may also need a separate EORI number if you move goods to or from Northern Ireland.
- If you do not have an EORI, you may have increased costs and delays. For example, if HM Revenue and Customs (HMRC) cannot clear your goods you may have to pay storage fees.
- You need to pay customs duties and VAT on all imports from 1 January 2021.
- From 1 January 2021, you'll need to make customs declarations when you import goods from the EU.
- In some situations, you can delay making a declaration for up to six months after you imported the goods.

More details can be found [here](#).

**Most declarations are submitted electronically through the Customs Handling of Import and Export Freight (CHIEF) system.**



### Prepare to export goods from Great Britain to the EU from 1 January 2021

- You should follow different guidelines if you are sending goods by post or exporting goods to countries outside the EU.
- From 1 January 2021, you'll need to make customs declarations when exporting goods to the EU. These rules currently apply to exporting goods to the rest of the world, including Switzerland, Norway, Iceland and Liechtenstein.
- You can make the declarations yourself, but most businesses use a courier, freight forwarder or customs agent.
- Most declarations are submitted electronically using the National Export System. If you're going to do this yourself, rather than appoint an agent, you'll need to register for the National Export System.
- You might also need to buy third party software that can submit declarations.
- There are different rules for:
  - carrying merchandise in your baggage with a value less than £873
  - exporting goods by post
- For most goods you'll make a full declaration, which must be made before the goods arrive at the port of export. If you do not your goods could get stopped at the border.
- However, there's a different process if you're using simplified declaration procedures.
- From 1 January 2021, the rules for exporting some types of goods will change. You will need to:
  - Check what export licences or certificates you need
  - Check the marking, labelling and marketing standards for food, plant seeds and manufactured goods
  - Check the rules for exporting alcohol, tobacco and certain oils

### For most goods you'll make a full declaration, which must be made before the goods arrive at the port of export.

- You need an EORI number that starts with GB to export goods from 1 January 2021.
- From 1 January 2021, you can charge customers VAT at 0% (known as 'zero rate') on most goods you export to the EU. You will need to check if you can 'zero rate' your goods for VAT.
- The EU business importing your goods will also need to prepare for 1 January 2021.
- Before sending the business your goods, check they can make the necessary import customs declarations. They'll also need a licence or certificate to import some types of goods.

More details can be found [here](#).

Note there are specific rules if you are moving goods into, out of or through Northern Ireland. See [here](#) for more detail.



# TRADE MARKS

A trade mark which was registered in the EU before the end of the Brexit Transition Period (i.e. 31 December 2020) will cover all EU member states. Prior to the end of the Transition Period, this registration would also have covered the UK. Following the end of the Transition Period, owners of an EU registration registered before the end of 2020 will benefit from UK clone mark.

Details of these key changes and others are given below:

## 1. Clone of existing EU trade marks after Brexit

Existing EU registered trade marks (registered before 31 December 2020) were 'cloned' onto the UK trade mark register. This means that the UK trademark register will include an exact copy of the trade mark as it appears on the EU register including all priority and seniority dates.

## 2. Opt-out

Any trade mark owner that does not want to receive a new comparable UK registered trademark (the EU cloned mark) may be able to opt out unless:

- a. *The mark has been put to use in the UK*
- b. *It is the subject of a licence, assignment, agreement, security interest, etc*
- c. *There are ongoing legal proceedings*

## 3. EU trade mark applications after Brexit

EU applications which were filed but not registered before the Brexit deadline have been given a grace period of nine months from the date of exit (until September 2021) to file an equivalent UK application.

When it comes to these equivalent applications, the UK intellectual property office will recognise filing dates and claims to earlier priority and UK seniority recorded on the corresponding EU application. However, this means a separate application will need to be filed at UK level, which will incur additional filing costs.

## 4. Renewals of EU trademarks after Brexit

Where the expiry date for an EU trade mark falls within the six month period following the end of the Transition Period (i.e. where renewal is due before the end of June 2021), owners will also need to renew their UK clone mark. This means that additional renewal fees will need to be paid to both the UK and EU intellectual property offices if businesses wish to maintain their EU trade mark and the UK cloned registration.

In the future it will be necessary to renew both the EU mark and cloned UK mark if it is to remain a valid right.

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## 5. Non-use

If you have an EU trade mark which has been registered for five years or more and you have mainly traded in the UK, your EU trade mark may be vulnerable to cancellation on the ground of non-use in the EU.

You should ensure that you have relevant use in the EU or consider your filing strategy where you cannot show relevant use.

## 6. Opposition to EU trademarks after Brexit

Any ongoing opposition against an EU trade mark will be dismissed in its entirety if it is solely based on UK rights.

## 7. Filing strategy

If you are considering filing a trade mark to cover the EU and will also be trading in the UK or vice versa, it is recommended that an application is filed in both the UK and EU simultaneously.

The above is only a summary of the headline issues and specific advice should be sort before filing trade mark applications. Our team specialise in global trade mark portfolio creation, maintenance and enforcement and can also offer further bespoke advice on issues around trade mark filing and expanding existing rights.

## 8. Registered designs

As with the EU trade mark, the same will apply for any EU registered designs. This will mean that all registered designs that achieved registration by 31 December 2020 will have been cloned onto the UK design register.

There will be a nine month grace period from the date of exit (until September 2021) to file an equivalent UK registered design but a note of caution, the application for a UK registered design must not fall outside of the twelve month grace period from either the date the design was first put to market or applied for anywhere in the world.

**You should ensure that you have relevant use in the EU or consider your filing strategy where you cannot show relevant use.**



## 9. GDPR

The data protection regulations are here to stay – the General Data Protection Regulation (GDPR) introduced EU wide in 2016 has been incorporated in to UK domestic legislation and is now known as the UK-GDPR. The Data Protection Act 2018 (DPA) continues to also have force and effect in England and Wales, albeit with amendments to incorporate the UK-GDPR.

The UK-GDPR and DPA do not lessen the burden on businesses in respect of their obligations and duties concerning personal data (being anything which serves to identify a living individual). As the UK and EU legislative make up changes over time, there is likely to be a similar approach by the UK to marry with legislation in the EU – this is partly because a large amount of UK personal data is processed in the EU and also because the GDPR is one of the most comprehensive legislative measures when it comes to data protection. If the UK falls behind the GDPR, or veers away from the approach and attitude of the EU on data protection, it is likely that an Adequacy Decision will fail or not be issued for the UK.

An Adequacy Decision (AD) is an EU Commission endorsement of a country (or part of a country) for the safe and legal processing of personal data in that country – it essentially allows that country to be treated as an EU member state for the purposes of data protection. The UK is currently in a cooling off period with the EU to negotiate and identify whether an AD can be granted to the UK. This period ends in June, but could be extended. At the moment, the recommendation is to hope for the best and prepare for the worst.

All UK organisations should have conducted some form of data mapping exercise which allows them to identify the processors they use and various information about those processing activities (e.g. the valid lawful basis for processing and the location of that processing). For processing outside of the EEA or in a territory not subject to an AD processors would also be required to enter in to a more extensive agreement (The EU recommends a prescribed format known as Standard Contractual Clauses). Organisations are encouraged to review and update their mapping document and enter in to appropriate agreements with any EU based processors or controllers so that, regardless of whether the UK is granted an AD, there is a seamless transition.

If the UK is not granted an AD there will need to be consideration as to whether an authorised representative is appointed in EU countries where EU personal data is processed – the extent, requirement and nature of processing that demands an authorised representative has not yet been made clear.

**If the UK falls behind the GDPR, or veers away from the approach and attitude of the EU on data protection, it is likely that an Adequacy Decision will fail or not be issued for the UK.**

## COMMERCIAL LEASES

One question that may be asked by EU headquartered businesses with UK operations is whether Brexit means that they can end their leases if they want to rebase their operations in the EU following our departure from the EU on 31 January 2020.

The decision in Canary Wharf (BP4) T1 Ltd and others v European Medicines Agency confirms that Brexit has no material impact on the continuation of existing leases. In that case, it was determined that leaving the EU does not give rise to a frustration of a lease, even if the purpose of the lease is no longer relevant. EMA argued that it had been agreed with the landlord that the purpose of the lease was to provide a permanent headquarters for the EMA for 25 years. They argued that Brexit meant that this purpose could no longer be achieved and that the common purpose of the lease would therefore fail. Therefore, Brexit will have no immediate impact on the continuation of commercial leases with EU tenants. However, that does not mean that there is no impact:

- *Many leasehold covenants refer to the need to comply with statutory provisions that are based on EU law, such as environmental legislation. As the UK transitions from existing statutory provisions to solely domestic provisions, the effect of statutory compliance covenants can change*
- *The ability to pursue a claim against an EU tenant or guarantor will be affected by the final deal. If the procedure that has to be used to bring a claim proves to be difficult or costly, expect landlords to require rent deposits or other forms of security from EU tenants*
- *Many well-drafted leases will have choice of law and jurisdiction clauses, but those will be even more important to avoid doubt about the law and jurisdiction applicable to disputes*



**Brexit will have no immediate impact on the continuation of commercial leases with EU tenants.**

## BREXIT AND CROSS-BORDER LITIGATION

With the end of the transition period in sight, there is now a little more clarity on the impact of Brexit on cross-border disputes.

The main issues that arise in relation to cross-border disputes are:

- *Choice of law: which country's laws apply to the dispute?*
- *Jurisdiction: in which country can court proceedings be brought?*
- *Enforcement: can the resulting judgment be enforced against a defendant based in a different country?*

The rules applied in the UK courts on these issues are contained in various international agreements and EU legislation. These rules will continue to apply in cases where court proceedings have been commenced before the end of the transition period, but what about cases arising after the end of the transition period?

Issues of jurisdiction and choice of law are often dealt with in commercial contracts by the parties expressly nominating the laws and courts of a particular country. There is some good news in relation to choice of law, because the UK will incorporate into domestic law the existing EU legislation containing the rules on choice of law. The remaining EU Member States will continue to be subject to the EU legislation, which requires them to give effect to choice of law clauses in contracts, including those nominating the laws of England and Wales.

The position in relation to jurisdiction and enforcement of judgments is not as straightforward. After the end of the transition period, the current rules contained in EU legislation will cease to apply. These rules are reciprocal between EU Member States and so incorporating them into English domestic law does not provide a solution.

The UK is taking steps to ensure that the UK will be a party to the 2005 Hague Choice of Court Convention after the end of the transition period. This will provide a partial solution, as it gives effect to exclusive jurisdiction clauses entered into after the Convention came into force. However, the Convention provides only limited provisions on enforcement of judgments and there is some uncertainty as to the date when the Convention will be treated as having come into force in the UK. More information on what this means can be found here.

The UK has also requested to join the Lugano Convention in its own right once the transition period ends. The Lugano Convention gives effect to choice of jurisdiction clauses and replicates most of the benefits of the EU regime relating to enforcement of judgments in civil and commercial matters. However, accession to the Lugano Convention requires the unanimous consent of all signatories and so far the EU has withheld its support for the UK's proposed accession.

It is important for any businesses contemplating entering into a commercial agreement with a party based abroad to seek advice and ensure that the agreement contains appropriate choice of law and jurisdiction clauses. Well-drafted dispute resolution clauses are also key in light of the uncertainty over the enforcement of English judgments abroad.

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## WE ARE HERE IF YOU NEED US

**This guide is for general information purposes only and should not be used as a substitute for legal advice relating to your particular circumstances.**

**If you are unsure of your legal obligations in any part of your business management, please get in touch with our team of expert legal advisors and we can support you through the process, whether in terms of rules around immigration, employment contracts, supply chain, data protection, commercial property disputes or any legal matters affecting your business.**

**For advice and support on any of the issues raised in this guide please email [enquiries@stephens-scown.co.uk](mailto:enquiries@stephens-scown.co.uk)**

