

## DRAFT



### PREPARING FOR A NO-DEAL BREXIT: SUBSTANTIVE ADVICE TO PRACTITIONERS

#### Introduction

1. The two-year “notice of intention to withdraw” period under Article 50 Treaty of the European Union (TEU) ends at midnight on 29 March 2019. Assuming that no revocation or extension of that notice has been secured in the interim, the EU Treaties will cease to apply to the UK, which will then cease to be a Member State of the EU. As at 14 November, it appears that agreement in principle on the terms of the Withdrawal Agreement and the Framework for the Future Relationship, has been reached as between the negotiators, although the latter document is currently still only in draft form.
2. But the deal must also be approved by HMG, the UK Parliament, and on the EU side, by a majority of the Member States and with the consent of the European Parliament. Thus, whilst the risk that the UK will leave the EU by automatic operation of Article 50(3) and without a deal has receded slightly this week, it remains a genuine risk, and one for which members of the Bar should be preparing themselves. The political situation in the UK in particular remains extremely uncertain.
3. You will be aware that if a deal is ratified, the (draft) Withdrawal Agreement<sup>1</sup> provides for a two-year (or potentially longer) transition period, during which the details of the future relationship between the UK and the EU will be negotiated and hopefully agreed. Broadly speaking, by the previously-agreed terms of the transition period, EU law will continue to apply to the UK, and the UK will continue to benefit from the EU’s international arrangements and be bound by its obligations. At the moment, the shape of any future relationship in respect of professional services is extremely uncertain. As such, should there be no final deal in place as at the end of those negotiations, or if the

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<sup>1</sup> ([https://ec.europa.eu/commission/publications/draft-agreement-withdrawal-united-kingdom-great-britain-and-northern-ireland-european-union-and-european-atomic-energy-community-0\\_en](https://ec.europa.eu/commission/publications/draft-agreement-withdrawal-united-kingdom-great-britain-and-northern-ireland-european-union-and-european-atomic-energy-community-0_en))

final deal is limited in scope to a free trade agreement for goods, it would be necessary to revisit the position at that point. For now, we are focussing on the immediate risk.

4. Thus, if there is no deal and the UK leaves on 29 March 2019, there will be no transition cushion. The impact will be immediate. Practitioners should be aware of this and inform and prepare themselves accordingly.

### **How would “no deal” impact my practice?**

5. The impact of a no deal Brexit will of course vary dramatically depending on your area of practice and how and where you exercise your practice rights.
6. Barristers who are established, or seek to secure their practice by establishing themselves, in another Member State, or who provide advice or appear in court, elsewhere in the EU, should refer to the UK Delegation to the CCBE (the Bars and Law Societies of the three jurisdictions)'s paper [Practice Rights – UK lawyers in the EU, Q & A](#)<sup>2</sup> at and / or the Law Society's [useful advice for practitioners](#)<sup>3</sup>. The equivalent advice for EU-qualified practitioners seeking to practice in the UK can be found [here](#)<sup>4</sup>.
7. The remainder of this paper focuses on substantive and procedural changes to the law itself.
8. Barristers who are specialised in “traditional” EU or international practice areas, such as competition, state aid, public procurement, migration, Intellectual Property, insolvency and telecommunications are likely already to be well informed through the considerable work of their SBAs and their individual engagement in the work of the Bar on Brexit.
9. But practitioners in less obviously EU-related areas of law should also inform themselves. By way of (non-exhaustive) example:
  - (i) Practitioners involved in cases where there is an EU cross-border element, such as:
    - Family cases where e.g. a party to the marital dispute is habitually resident in; or absconds with a child to; or has assets in; or seeks refuge from domestic violence in, an EU Member State.
    - Personal injury cases where one of the parties involved is habitually resident, or the accident itself took place, in an EU Member State.

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<sup>2</sup>[https://www.barcouncil.org.uk/media/691502/practice\\_rights\\_uk\\_lawyers\\_in\\_the\\_eu\\_qa\\_final\\_october\\_2018.pdf](https://www.barcouncil.org.uk/media/691502/practice_rights_uk_lawyers_in_the_eu_qa_final_october_2018.pdf)

<sup>3</sup> <https://www.lawsociety.org.uk/support-services/advice/articles/no-deal-brexite-providing-legal-services-in-eu/>

<sup>4</sup> [https://www.barcouncil.org.uk/media/691181/180515\\_eu\\_lawyers\\_in\\_the\\_uk\\_-\\_practice\\_rights\\_qa.pdf](https://www.barcouncil.org.uk/media/691181/180515_eu_lawyers_in_the_uk_-_practice_rights_qa.pdf)

- Criminal cases where the defendant, victim, witnesses or other potential or existing evidence are in an EU Member State; or where it is necessary to obtain (timely) information on previous convictions from an EU Member State; or return or secure the return of a convicted person to serve their sentence in their home state.
  - Cases of non-exercise or other breach of contract where the supplier of the good or service is based in an EU Member State.
- (ii) Practitioners who are active in fields where (much) of the law applied domestically is derived from EU law, even if any particular case has no cross-border element per se, should be informing themselves of the extent to which the law may change upon, or after, Brexit. Here, one thinks of consumer protection, employment and discrimination, health and safety, and environmental protection, to name but a few. The same is true for those practising in fields which have been overseen by an EU regulator, since domestic arrangements to replace those are far from settled.
- (iii) Practitioners involved in cases which, though domestic, may result in judicial decisions, be they interim or final, that need to be recognised or enforced in an EU Member State, should also be aware of the impact of no deal. That clearly means informing yourself of the expected state of the law on Brexit following the loss of the Brussels I recast regulation and other such measures (as of now, expected to involve reversion to common law with possible ratification of international conventions). But for practitioners advising in low value claims, for example, it will also mean the loss of EU procedural instruments such as the European Payment Order Procedure or the European Procedure for Small Claims.

### **How do I inform myself?**

10. If you are not already doing so, you should sign up for updates and / or regularly refer to the various sources of information that are available to you. Principal among these:

### **EU preparations for no-deal Brexit**

11. The EU is publishing notices to stakeholders advising them of the impact of a no deal Brexit in different areas. For the most part, these notices amount to lists of EU measures that will no longer apply to (relations with) the UK in different sectors.
12. Unlike in the UK (see below), there is no guarantee that any of the enforceable EU law rights currently enjoyed by UK nationals and businesses in the national courts of other Member States would be preserved in a no deal situation – on the contrary, the default position would be that all of those rights would simply come to an end on 29 March 2019 unless and until something else is agreed or some specific provision for UK businesses and nationals was made by individual Member States acting in accordance with EU law. *Practitioners are strongly advised to refer to notices that are relevant to their practice area,*

including those of general application such as the notice on civil justice and private international law and on data protection. See links to all such notices [here](#)<sup>5</sup>.

## UK preparations for no-deal Brexit

13. The starting point is the European Union (Withdrawal) Act 2018 (the EUWA), the latest version of which is available [here](#)<sup>6</sup>.
14. The overarching intention of the EUWA is to import EU law wholesale into UK law on Brexit day, though with exceptions which are beyond the scope of this paper. In essence, measures adopted to give effect to EU directives are preserved by section 2, EU regulations are transposed into UK legislation, and other directly applicable rights currently adopted into UK law by section 2 of the European Communities Act 1972 are preserved by section 4 of EUWA. However, given that they are no longer underpinned by EU law, all of these measures are subject to amendment, in many cases by secondary legislation.
15. This legislative structure inevitably gives rise to widespread uncertainty as to the likely amendments and repeals that will be made in a no deal situation. In addition, although the message received from HMG is “no policy change”, some changes are inevitable as a result of no longer being inside the EU. Moreover, the speed and extent of future divergence is difficult to predict and is likely to vary from one policy area to another. There would also be significant challenges in making certain regimes work effectively in the absence of reciprocity from other Member States and/or the EU.
16. The immediate challenge arising is in the interpretation and application of the EUWA in a no-deal scenario. Like the EU, HMG is publishing notices giving advice across different sectors. *Practitioners should refer to relevant notices and sign up for automatic updates.* See: <https://www.gov.uk/government/collections/how-to-prepare-if-the-uk-leaves-the-eu-with-no-deal#history>
17. At a more detailed level, government departments are busy drafting Statutory Instruments (SIs) to implement the EUWA if no transition period applies. For the list of SIs, which again is being continuously updated, go to: <https://www.gov.uk/eu-withdrawal-act-2018-statutory-instruments>
18. Different departments are approaching this exercise with varying methodology, degrees of urgency and likely end solutions, so it is not possible to provide detailed generalised advice. A snapshot of the current position in one or two areas will serve to illustrate the challenge:

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<sup>5</sup> [https://ec.europa.eu/info/brexit/brexit-preparedness/preparedness-notices\\_en#just](https://ec.europa.eu/info/brexit/brexit-preparedness/preparedness-notices_en#just)

<sup>6</sup> <http://www.legislation.gov.uk/ukpga/2018/16>

### **Example 1 - Financial Services**

- There is a myriad of SIs currently in the works in this field, introducing inevitable policy changes. Some of these policy changes are so significant that the financial services industry will not be in a position to comply by 30 March 2019. Accordingly, HM Treasury is expected to give the regulators power to delay the application of the new domestic legislative framework. In the interim, the existing EU financial services regime is likely to apply in full, though how that will work in areas which would normally rely on reciprocity / equivalence is not yet clear.
- Financial Services practitioners are thus struggling to identify what law will govern their activities post-Brexit. Problems include lack of legal certainty due to the fact that some of the SIs amend EU law as at exit day, others at the date they come into force, and still others freeze references to EU law in existing primary law. Moreover, multiple SIs amend the same EU regulation, making it difficult to follow the changes through. The risk of gaps is significant.
- In addition, the EUWA does not currently give vires to solve some of the problems it creates.

### **Example 2 - Personal Injury - Cross-border motor insurance claims**

- The EU Motor Insurance Directives (EU MID) enhanced the protection of road traffic victims within the EEA, through coordination bodies in each Member State (in the UK the Motor Insurers Bureau (MIB) and the introduction of, inter alia, compulsory insurance valid throughout the whole EEA territory and protection for visiting victims.
- As with financial services, HMG and here, the MIB, are working behind the scenes on no deal arrangements. No deal would mean the above MID regime falls away on Brexit day, along with more general automatic cross-border recognition and enforcement of (civil) judgments under the Brussels I Regulation recast (see Commission notices above). Efforts are thus underway to try to secure bi-lateral agreements with key Member States with which there is the greatest likely incidence of future cross-border accidents cases.

19. These two very different examples reveal both the complexity of what we are facing and the need for practitioners to engage individually, and through their SBAs, to inform themselves ahead of time, so far as possible, of the effects that a no-deal Brexit would have on their practice and clients.

*Please keep abreast of the developments posted through the EU and UK links above.*

## Bar Council Brexit support for practitioners

20. To assist you in this extremely complicated and uncertain exercise, the **Bar Council's Brexit Working Group** and **EU Law Committee** continue to provide expert guidance and advice on the legal issues at stake. Members are active in various external stakeholder groups and frequently give evidence to Parliamentary committees and others on Brexit. Please refer to our *Brexit Webpage* for updates on our activities, events and links to our *Brexit Papers*, at: <https://www.barcouncil.org.uk/media-centre/brexit/>
21. Should your own investigations reveal issues that render the law or its practice untenable in a specific field, do bring these to our attention. If we are not already doing so, we can then also keep track of those developments and bring the issue to the attention of the UK authorities. We will keep all issues under review, and consider what, if any, action is possible and may usefully be taken, be that further analysis, lobbying or information dissemination through various means.
22. We are hosting a **Brexit session at the Annual Bar Conference in London on 24 November**, providing a timely opportunity to pose questions to our panel of experts from DExEU (tbc), our own Bar and including the current, and immediate past, Chair of the Northern Irish and Irish Bars respectively. For more information click [here](#)<sup>7</sup>.
23. Apart from our own work, there are regular Brexit-related events organised, and advice, insights and blogs produced, by individual Chambers, universities, academics, think tanks, other professional organisations such as the Law Society and stakeholder groups, such as the UKAEL, BIICL to name but a few. Again, keep an eye on websites for up-to-date information.
24. Practitioners may also wish to sign up to receive the Bar Council Brussels Representative's newsletter, *Brussels News*, which includes a Brexit update and analysis section, including relevant links such as those above, as well as to informative articles, blogs and events. Please email: [evanna.fruithof@barcouncil.be](mailto:evanna.fruithof@barcouncil.be)

## Brexit Working Group November 2018

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<sup>7</sup><https://www.barcouncil.org.uk/supporting-the-bar/conferences,-training-and-other-events/2018/november/annual-and-young-bar-conference-2018/>

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