



Perspectives on the Brexit Agreement

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On January 29, 2020, the European Parliament approved the agreement on the exit of the United Kingdom from the European Union and the European Atomic Energy Community (EURATOM).

On January 31, 2020, the agreement entered into force and the United Kingdom left the European Union. However, a transition period was established, lasting until December 31, 2020.

In this document, we analyze some of the most relevant aspects of the agreement relating to residence and social security, trade, financial services, intellectual property, jurisdiction, applicable law, insolvency, and taxation.



On October 17, 2019, the Heads of State and Governments of the now 27 Member States of the European Union adopted a new [Agreement on the withdrawal of the United Kingdom of Great Britain and Northern Ireland from the European Union and the European Atomic Energy Community](#) (the “**Agreement**”) and the [Political declaration setting out the framework for the future relationship between the European Union and the United Kingdom](#) (the “**Political Declaration**”). Although the Agreement is a legal text that is part of the primary law of the European Union (the “**EU**”), the Political Declaration is a document of a political nature, which is not binding.

The new Agreement, published in the Official Journal of the European Union on November 12, 2019, is similar to the previous one, dated November 2018. However, to preserve the Good Friday Agreement, it introduces certain features regarding the border between the Republic of Ireland and Northern Ireland.

On January 29, 2020, the European Parliament adopted the Agreement, which was previously ratified by the British Parliament arising from the elections held on December 12, 2019.

On January 31, 2020, the Agreement entered into force and the United Kingdom (the “**UK**”) left the EU. However, a transition period was established, lasting until December 31, 2020. This transition period may be extended for a maximum of two years, provided it is requested before July 1, 2020; also, during this extension, certain conditions will be applicable.

EU law will continue to apply in relation to the UK during the transition period, with the same effects and conditions as those that apply to all other Member States. During this period, the normative references of EU law to Member States include the UK. However, the matters expressly referred to in the Agreement fall outside the transitional arrangements, such as those related to the presence of the UK in EU governance institutions and structures.

The Agreement assumes the complexity of its implementation, as demonstrated by the establishment of a Joint Committee responsible for its implementation and enforcement, several special sectoral committees, and the submission to arbitration of the resolution of disputes between the EU and the UK.

Organized by topics, we analyse below the most important matters regulated in the Agreement.



Residence and social security

The right of any EU citizen and their families to live, work or study in an EU Member State is one of the foundations of the EU. Many citizens of the EU and the UK have made life choices based on rights relating to free movement under EU law.

The Agreement protects EU citizens residing in the UK and UK nationals residing in one of the 27 Member States of the EU at the end of the transition period, where residence conforms with EU legislation on the freedom of movement.

We now clarify how the Agreement will affect EU citizens resident in the UK and UK citizens resident in a Member State (i) during the transition period, (ii) after that period has ended, and (iii) in terms of social security.

Effects during the transition period (between February 1 and December 31, 2020, which may be extended for one or two years)

There are no changes to the rights of EU citizens who currently live in the UK and to the rights of UK citizens currently living in a EU Member State until the end of the transition period.

EU law on freedom of movement will continue to apply to EU and UK citizens alike as if the UK were a member of the EU.

Regarding the right of residence, EU citizens resident in the UK and UK citizens resident in the EU will be entitled to continue living under the same conditions in the host State and obtain permanent residence after five years of continuous and legal residence.

Effects after December 31, 2020

The Agreement allows both citizens of the EU and UK nationals, as well as their family members, to continue exercising their rights under EU law in the territories of each party for the rest of their lives, provided these rights are based on life choices made before the transition period ends.

Under the EU Settlement Scheme, EU citizens living in the UK must apply for new residency status until June 30, 2021, as a condition to continue residing in the UK.

If they have already resided for more than five years on the date of application, they will be granted *Settled* status. If they have resided for less time, they will be granted *Pre-Settled* status, with the option of obtaining recognition of *Settled* status once they meet the five-year requirement.



The Agreement establishes certain rights for workers in their host States and for border workers in the State(s) where they work, such as (i) the right not to be discriminated against on grounds of nationality; (ii) the right to equal treatment with regard to working conditions (particularly regarding pay and dismissal); and (iii) recognition of collective rights.

Social security

Regarding social security, the objective of the Agreement is to ensure that everything remains as it is today and that **EU rules** continue to be applied after the transition period.

For example:

- The UK will continue to be responsible for the social security benefits of EU citizens resident in the UK who pay their contributions there and are entitled to receive benefits in that country. Portuguese citizens residing in the UK who receive a Portuguese social security pension will continue to receive it, as they are paid to their holders regardless of where they reside. For UK citizens living in Portugal and receiving a UK social security pension, the Community Regulations for the coordination of social security systems will continue to apply, and the UK will continue to export his or her pensions.

For the purposes of future contributory pensions in Portugal, the contributory time in the UK will be considered at least until the end of the transition period (December 31, 2020).

If, on December 31, 2020, a worker is working in the UK, subsequent contribution periods in the UK will also be recorded for the duration he or she continues to work in the UK, as the coordination regulations of the social security systems will continue to apply.

If the worker is no longer in the situation above, the contribution periods will only be calculated up to that date.

- Until December 31, 2020, EU citizens residing in the UK will have access to healthcare in the UK under the same conditions as those of UK citizens, regardless of whether they are registered in the EU Settlement Scheme.

In case of loss of employment after the transition period ends, EU citizens will be entitled to receive unemployment benefits in the UK and will be able to export these benefits.



Trade

Under the Agreement, goods that have been lawfully placed in the market in the EU or the UK before the date the transition period ends may continue to be marketed and move freely until they reach the final destination without having to meet additional requirements. One exception is the movement of live animals, reproductive products and products of animal origin, due to the health risks associated with these products.

The Political Declaration refers to the future economic relationship between the EU and the UK, in which the option is for a model based on a free trade agreement. The Political Declaration confirms the desire to enter into a free trade agreement without tariffs, taxes or quantitative restrictions in any sectors. It also states that the general agreements will create a free trade zone where there will be profound customs and regulatory cooperation, supported by provisions guaranteeing equal conditions for open and fair competition.

Financial services

The Agreement does not contain any explicit reference to financial services or their regulations. However, the Political Declaration includes the political intention to enter negotiations during the transition period to establish a framework for relations in this area.

In the absence of express reference, and under the general rules of the Agreement, EU law will continue to apply to the UK during the transition period. Consequently, the passport regime for the benefit of the financial institutions of the UK and the EU Member States will be preserved.

The possibility that, after Brexit, the UK may continue to be a member of the European Economic Area ("EEA") is particularly relevant, as the rights of the "passport" of financial services also extend to Member States of the EEA that are not Member States of the EU.

In the increasingly likely scenario that the UK will not remain in the EEA, the UK would become a third country, depending on the regime adopted. The UK negotiators aim to reach an *ad hoc* free trade agreement covering financial services and granting both parties rights similar to those of the financial services passport in certain areas. However, the EU is more inclined to apply the general regulatory third country regime to the UK, submitting its relations with the UK to the Community equivalence model, as with other third countries such as the United States, Canada and Japan.

The Community equivalence model, though simplifying the regulatory regime of third-country entities, does not guarantee for non-Community financial institutions the same financial services passport rights and rights of access to the single market for a wide range of financial services and activities.



For the UK to be considered "equivalent" in the future, it would have to maintain its regulations in accordance with those of the EU. However, it will no longer be involved in the Community legislative processes from the date it left in January 31, 2020. The European Commission has the discretionary power to determine, at any time, whether a third country may be considered "equivalent."

Until recently, the uncertainty surrounding the approval of the Agreement and whether there would be a transition period meant that the authorities of the UK and the EU made contradictory statements about the position financial institutions should take on this matter.

Intellectual property

Regarding intellectual property, the option was for a continuity model with no major disruption. Holders of EU trademarks, Community designs or models and Community protection on plant varieties registered or granted before the date the transition period ends become, without a need for re-examination, holders of an equivalent intellectual property right registered and able to be applied in the UK under its national law. This registration will be automatic and free of charge.

A similar continuity scheme is expected for the geographic indications, denominations of origin, traditional specialties guaranteed and traditional terms for wines that enjoy protection on the last day of the transition period.

Unregistered Community designs that appear before the date the transition period ends will come to have an equivalent right in the UK, with the same level of protection. Also protected in the UK will be international registrations of trademarks or designs that have the EU as their territory of protection. Protection will also be maintained for the *sui generis* right over databases relating to the UK.

It is also expected that the priority and the date of submission of an application to register an EU trademark or Community design or model pending at the end of the transition period may be used by the respective applicant, provided it submits, within nine months, a new national trademark, design or model application in the UK. A similar system is created for pending applications for Community plant varieties, with six months to resubmit in the UK.

Data protection

Regarding data protection, the Agreement aims to ensure that the UK will continue to have due regard for the rights of interested parties as till now. To process the data of persons



outside the UK, the UK will continue to apply the EU data protection rules, unless the European Commission declares that the UK already offers an adequate level of protection. If this decision on adequacy is no longer applicable, the UK agrees to provide an equivalent level of protection for the data of the holders.

Although the UK is no longer part of the EU, the EU agrees not to use the data and information obtained from the UK in any way that differs from how it processes the data obtained from Member States.

Jurisdiction/applicable law/insolvency

Another important legal area directly affected is that of judicial cooperation. At the end of the transition period, the UK will cease to be part of the European Area of Freedom, Security and Justice. Currently, decisions of UK courts (including protective measures) are recognized in the other Member States because of regulatory instruments such as Regulation 1215/2012 (Brussels I bis), which favor legal certainty and the effectiveness of international decisions.

Equally important is the plan for determining the applicable law in the contractual framework, which, until now, has been governed by the provisions of European Regulation 593/2008 (Rome I), which provides conflict rules and legal certainty in the international contracting sector.

After the departure of the UK, the Brussels I bis will no longer apply to the UK. For the UK, the system of international jurisdiction in trade matters will no longer be the arrangements established in Brussels I bis. Also, the recognition and enforcement of UK decisions in the rest of the EU will follow the general system of recognition and enforcement (provided for all states that are not part of the EU). The Portuguese courts will continue to apply Rome I Regulation, so the submission of a contract to UK law remains valid. However, this submission is limited by the application of the mandatory regulations of the jurisdiction.

The exclusion of the UK from European civil judicial cooperation could be mitigated through the foreseeable recognition and ratification of bilateral conventions between the EU and the UK, or through the ratification of other multilateral conventions. These texts may provide the necessary amount of legal certainty in terms of international jurisdiction, applicable law and the regime for the recognition and enforcement of foreign judgments. The UK has already expressed its intention of remaining bound by the Hague Convention on the choice of venue.

Regarding insolvency, the new position of the UK as a third country will significantly affect its relations with the EU. As Regulation 2015/848 (Insolvency Regulation II) will cease to apply, and unless its content is extrapolated to a future bilateral convention between the EU



and the UK, the future recognition of the Schemes of Arrangement (SoA) within the context of international financial restructuring that might be signed in the UK by companies that are not headquartered there will be seriously affected. Access to restructuring in the UK under the SoA may no longer be attractive to the economic operator since, as the Insolvency Regulation will no longer apply for the recognition of these decisions, this arrangement will become more complex: they should be recognized in application of the general regime on the recognition and enforcement of foreign judgments.

Taxation

In the tax area, the focus of the Agreement is on issues relating to customs, value-added tax (VAT) and excise duties:

- > Regarding customs, the current regime will continue to apply to the movement of goods between the UK and the EU that starts before the date the transition period ends, even if the arrival at the destination occurs after that period (which ends in December 2020, although it could be extended for one or two years). It will be considered a movement of goods within the EU relating to the import and export licensing requirements of EU law. The movement of goods starting before the date the transition period ends should be able to be completed under the EU rules in force at the time this movement began. Generally, the presumption of the customs statute for EU goods would no longer apply to the movement of goods. If the presumption is not applicable, the start date of the movement would have to be proven through any of the means of evidence established by regulations.
- > For VAT purposes, any delivery of goods and provision of services between the UK and the Member States of the EU starting before the date the transition period ends will be considered intra-Community operations, regardless of whether, in the case of the delivery of goods, they reach their destination after the date the transition period ends.
- > Regarding the new Agreement amending the Protocol on the Republic of Ireland and Northern Ireland, the purpose is to avoid a border between the Republic of Ireland and Northern Ireland, protecting the Good Friday Agreement, as well as the island economy and the integrity of the EU Single Market. Therefore, any goods from the island of Great Britain that are not in free circulation could be inspected at the entry points in Northern Ireland (but not at the border with the Republic of Ireland). There will be no automatic duties on these goods, unless there is the risk that these goods end up entering the Republic of Ireland or the EU. Although Northern Ireland will come to be part of the VAT territory of the UK, EU rules will continue to apply to trade between Northern Ireland and the Republic of Ireland.



- The Political Declaration declares the intention of reaching an ambitious free trade agreement, to be established in 2020, with no customs duties or quotas, which would come into force when the transition period ends.
- Once the transition period has ended, the **VAT Directive** will also apply for a five-year period to the rights and obligations of parties subject to taxation in operations between a Member State of the EU and the UK that started before the date the transition period ends.
- Another date that should be considered for VAT purposes is March 31, 2021, which is the deadline for requesting the refund of VAT paid in the UK by a resident in an EU Member State, and vice versa.
- December 31, 2021 is the deadline for altering any VAT declarations that have been filed in the UK for services provided in an EU Member State, and vice versa.
- As in the provisions on customs and VAT, the Agreement states that the **Excise Duty Directive** will continue to apply to any movements between the territory of the UK and that of a Member State of the EU, and vice versa, of products subject to special taxes, which might have started before the date the transition period ends.

The Agreement does not contain any specific mention of the scope of direct taxation. However, for a four-year period after the transition period, the European Commission may start new administrative procedures regarding state aid granted before the date the transition period ends. This possibility is significant, as the European Commission has been using the state-aid procedure as a kind of "negative harmonization" procedure for direct taxation. According to this, the UK will, in principle, cease to be classified as a Member State on January 1, 2021, when the transition period ends. From then on, for the purposes of the domestic regulations of the Member States, the provisions applicable to other Member States of the EU (including those transposing directives into national law or those that establish special tax treatment for these states) will no longer apply to the UK.

The new version of the Agreement amends the wording of Annex 4 to the Protocol on the Republic of Ireland and Northern Ireland (the "**Protocol**"). This amendment means the Agreement no longer provides for the commitment of the EU and the UK to global transparency and information-exchange standards, fair taxation, the principles of the Base Erosion and Profit Shifting Plan of the OECD, or the **Code of Conduct on business taxation**. It also means the UK is no longer committed to applying the domestic provisions transposing, *inter alia*, the **Directive on administrative cooperation in tax matters** or the **Anti-Tax Avoidance Directive**.

Any conventions for the avoidance of double taxation signed between the UK and the Member States of the EU will not be affected by the Agreement. Therefore, unless one of



the contracting states withdraws from the convention, their provisions will continue to apply. To clarify, in principle, Brexit will not affect the current allocation of taxation powers between the Member States and the UK in the taxation of dividends, interest, royalties, capital gains, earned income, or pensions, provided the convention in question is effectively applicable.

The mutual assistance procedure for the recovery of claims relating to taxes, duties and other measures (Directive 2010/24/EU) will apply to certain claims for up to five years after the date the transition period ends (including the amounts due before the end of the transition period and any claims relating to transactions carried out before the date the transition period ends, but which trigger amounts receivable afterwards).



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