
Perspectives of the Brexit agreement reached by the European Union and the Government of the United Kingdom

Legal flash

February 2020



On January 9, 2020, the European Parliament approved the Agreement on the withdrawal 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 ceased to belong to the European Union. However, a transition period has been established, which will last until December 31, 2020.

In this document, we review the main issues of the agreement relating to matters of residence and social security, trade, financial services, intellectual property, jurisdiction, applicable law, insolvency, and taxation.



On October 17, 2019, the Heads of State and of the Governments of the other 27 Member States of the European Union (the “EU”) gave their support to a new **Agreement on the withdrawal of the United Kingdom from the European Union and EURATOM** (the “**Agreement**”) and the **Political Declaration, which sets out the framework for the future relationship between the European Union and the United Kingdom** (the “**Political Declaration**”). The Agreement will become a legal text that forms part of EU primary law; however, the Political Declaration is a document of a political nature, which is not binding.

The Agreement, which was published in the Official Journal of the European Union on November 12, 2019, maintains similar terms to the ones of November 2018. However, to preserve the Good Friday Agreements, it introduces certain details regarding the border between Ireland and Northern Ireland.

On January 29, 2020, the European Parliament approved the exit Agreement previously ratified by the UK Parliament resulting from the elections held on December 12, 2019.

The Agreement entered into force and the United Kingdom (the “UK”) ceased to belong to the EU on January 31, 2020. However, a transition period has been established, which will last until December 31, 2020. This transition period may be extended by up to two years, provided it is requested before July 1, 2020. If the extension is requested, certain conditions would apply.

During the transition period, EU Law will continue to apply in the UK, with the same effects and under the same conditions as those that apply to other Member States. During this period, the regulatory references of EU Law to Member States include the UK. However, any issues expressly included in the actual Agreement, such as those relating to presence in governance structures and institutions, would not be included within the transitional regime.

The Agreement assumes the complexity relating to its implementation, as shown by the fact that the creation is contemplated of a Joint Committee, which is responsible for its implementation and application, and various special sector agreements, as well as the resolution of any disputes between the EU and the UK through arbitration.

Below are some of the most relevant issues of the Agreement organized by subject-matter.



Residence and social security

Regarding the free movement of people, the Agreement maintains these rights until the end of 2020, as if the UK were a member of the EU, both for EU citizens and UK citizens, including the right of residence: the citizens of each party who have resided in the other will be entitled to continue living under the same conditions and acquire permanent residence after continuous legal residence of five years.

Below is an explanation of how the Agreement will affect citizens of the EU resident in the UK and UK citizens resident in a Member State (i) during the transition period, (ii) once the transition period has ended, and (iii) in matters of social security.

Effects during the transition period (from the start of the transition period up to December 31, 2020, subject to being extended by one or two years)

There are no changes in the rights of EU nationals currently living in UK until June 30, 2021, or December 31, 2020, in the event of an exit with no agreement.

EU laws on matters concerning free movement will continue to apply to EU and UK citizens.

Effects after December 31, 2020

Before December 31, 2020 (in the event of an exit with no agreement) or before June 30, 2021 (in the event of an agreement), all EU citizens in the UK should apply for their registration as EU residents under the EU Settlement Scheme to continue residing in the UK.

If they have resided in the UK for more than five years before the application, they will have settled status. If they have resided in the UK for a shorter period, they will be classified as pre-settled, with the option of becoming settled after the five years.

The Agreement establishes certain rights for workers in the host Member State and border workers in the Member State(s) of work, such as the right not to be discriminated against on grounds of nationality, the right to receive equal treatment in respect of work conditions (particularly remuneration and dismissal), and the recognition of collective rights.

Social security

Regarding the social security regime, the Agreement aims to guarantee that everything will continue as at present, and that **EU rules** will continue to apply 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 contributions there and are entitled to receive benefits in that country. Spanish citizens residing in the UK and receiving a contributory pension from Spanish social security will continue to receive it, as it is paid to the holder (regardless of where they reside). If the Spanish or UK citizen is residing in Spain and receives a pension from the UK social security system, the Community Rules on Social Security Coordination will continue to apply, and the UK will continue to export its pensions.

For the effects of any future contributory pensions in Spain, account will be taken of any periods during which contributions have been made in the UK at least until the date the transition period ends (December 31, 2020).

If the employee is working in the UK on that date, any subsequent periods in which contributions are made in the UK during this situation will be calculated in the same way, because, in that case, the Community Rules on Social Security Coordination will continue to apply while that situation (working in the UK) persists.

If the worker is not in that situation, only those periods in which contributions were made until then will be included in the calculations.

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

In the event of a loss of employment after the transition period ends, EU citizens will be entitled to receive unemployment benefits in the UK and may export those benefits.

Trade

Under the Agreement, any goods introduced legally into the market of the EU or the UK before the end of the transition period may continue to be marketed and circulate freely until they reach their destination, with no need to comply with any further requirements. However, this does not apply to live animals, reproductive material and products of animal origin between a Member State and the UK, or vice versa, because of the health risks associated with these products.

For its part, the Political Declaration refers to a future economic relationship between the EU and the UK, where a model has been chosen based on a free trade agreement. The



Political Declaration confirms the intention to establish a free trade agreement with no tariffs, fees, charges or quantitative restrictions in any sector. Also, it states that comprehensive arrangements will create a free trade area with deep regulatory and customs cooperation, underpinned by provisions ensuring a level playing field for open and fair competition.

Financial services

The Agreement does not explicitly mention financial services or their regulations. However, the Political Declaration includes the political intention to start negotiations during the transition period to establish the framework for relations in this area.

In view of the absence of any express mention, according to the general rules of the Agreement, during the transition period, EU Law will continue to apply to the UK. Consequently, the passport regime will be kept to the benefit of the financial institutions of the UK and of the Member States of the EU.

As is well known, of particular relevance is the possibility that, after Brexit, the UK might continue to be a member of the European Economic Area (“EEA”), given that the rights of the so-called “passport” for financial services also extend to Member States of the EEA that are not part of the EU.

In any case, in the increasingly likely scenario that the UK will not form part of the EEA, it would come to be classified as a third country dependent, where applicable, on the regime agreed. The UK negotiators intend to reach *ad hoc* free trade agreements covering financial services and affording both parties rights similar to those of the financial services passport in certain areas, where the EU would seem inclined to apply to the UK the general regulatory regime of a third country and so submit its relations with the UK to the Community equivalence model, as it does with other third countries such as the United States, Canada and Japan.

Although the Community equivalence model simplifies the regulatory regime of companies from third countries, it would not guarantee non-Community financial institutions the same passport rights for financial services and access to the single market in respect of a wide range of services and financial activities.

For the UK to be considered “equivalent” in the future, it would have to keep its regulations in line with those of the EU, despite not having any role in Community legislative procedures as from its exit in 2020. In any case, the European Commission has the discretionary right to determine at any time whether a third country may or may not be considered “equivalent” for these purposes.



Also, the uncertainty in the short term relating to the approval of the Agreement and, therefore, to the existence or otherwise of a transition period, has meant that the UK and EU authorities have made several contradictory statements regarding the position financial institutions should adopt in this case.

Intellectual property

Within the area of intellectual property, the emphasis is on a model of continuity with no great disruption. Holders of EU trademarks, Community designs and Community protection for plant varieties that have been registered or granted before the end of the transition period would, under the law of the UK, with no need for any further review, become holders of an equivalent intellectual property right enforceable in the UK. This registration would be automatic and free of charge.

A similar system of continuity is foreseen for geographical indications, designations of origin, traditional specialties guaranteed and traditional terms for wines that enjoy protection on the last day before the end of the transition period.

Any non-registered Community designs arising before the end of the transition period would become an equivalent right in the UK with the same level of protection. Any international registrations of trademarks or designs that have designated the territory of the EU would also be protected in the UK. The protection of the *sui generis* right over databases relating to the UK would also be maintained.

It is also envisaged that the priority and date of filing will be respected for EU trademark applications or Community designs that are in progress at the end of the transition period, so that, within a nine-month period, a new application for a trademark or national design can be made in the UK. For Community plant variety protection applications in progress, a similar system is established, with six months for repeating the application in the UK.

Data protection

The Agreement aims to ensure that, in the UK, the rights of interested parties will continue to be respected as they have been to date. It establishes that, for the processing of the data of persons from outside the UK, the UK will continue to apply the EU data protection regulation, unless the European Commission, through an appropriate decision, declares that the UK offers a suitable level of protection. If this decision on suitability ceases to apply, the UK agrees to offer an equivalent level of protection for the data of those interested parties.



For its part, the EU agrees not to use the data and information obtained from the UK differently from how it processes data obtained from a Member State simply because the UK no longer forms part of the EU.

Jurisdiction/ applicable law/ insolvency

Another important legal area directly affected is that of judicial cooperation. When Brexit takes place, once the transition period has ended, the UK will cease to form part of the European Area of Freedom, Security and Justice. At present, any decisions adopted by the UK courts (including interim injunctions) are recognized in the rest of the Member States thanks to regulatory instruments such as Regulation 1215/2012 (Recast Brussels Regulation) that favor legal certainty and the international efficacy of decisions.

Another aspect of equal importance is determining the applicable law within a contractual scope, which is governed by the provisions of European Regulation 593/2008 (Rome I), regulating any conflict of law and providing a prospecting factor and legal certainty to this sector of international contractual obligations.

After the departure of the UK, the Recast Brussels Regulation will cease to apply. Consequently, the international legal competition regime in commercial matters, for the UK, will cease to be the regime established under the regulation. Also, the recognition and enforcement of UK decisions in the rest of Europe will be that established in the general regime for recognition and enforcement (that established for any third country). Spanish judges will continue to apply the Rome I regulation. Therefore, express submission to UK law will still be 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 instruments could be mitigated through the foreseeable negotiation and ratification of bilateral conventions between the EU and the UK, or through ratification of other multilateral conventions. These texts may provide the necessary amount of legal certainty on the level of international judicial 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 courts.

On matters of 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 a Scheme of Arrangement (SoA) within the framework of international financial restructuring that might be signed in the UK by companies that are not domiciled there will be seriously affected. Access to restructuring in



the UK under the SoA may cease to be attractive to commercial operators since, as the Insolvency Regulation no longer applies for the recognition of these decisions, this arrangement will be more complex: they should be recognized in application of the general regime on the recognition and enforcement on foreign decisions.

Taxation

Within the area of taxation, the focus of the Agreement is on questions relating to customs, value-added tax (VAT) and excise duty:

- Regarding customs, the current regime would still apply to the movement of goods between the UK and EU territory starting before the end of the transition period (which would end in December 2020, although there could be an extension of another one or two years), even if the arrival at the destination takes place after the transition period has ended. Any goods introduced under a customs regime in the UK before the transition period ends would continue to be considered EU goods until they are finalized. In general, the presumption of the customs statute for EU goods would not apply to the movement of goods, although it would apply in certain cases of transportation by air or sea. If the presumption is not applicable, this should be shown 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 end of the transition period would be considered intra-Community operations, regardless of the fact that, in the case of the delivery of goods, they might reach their destination after the transition period has ended.
- Regarding the new Agreement amending the Protocol on Ireland and Northern Ireland, the purpose is to avoid a border between Ireland and Northern Ireland, protecting the Good Friday Agreements, as well as the economy of the island and the integral nature of the EU market. Therefore, any goods coming from the island of Great Britain could be inspected at entry points in Northern Ireland. There would be no automatic tariffs on these goods, unless there is a risk that they end up in Ireland or in the EU. For its part, Northern Ireland will maintain the European regulations governing goods (single market).
- The Political Declaration declares the intention of reaching an ambitious Free Trade Agreement, to be established in June 2020, with no tariffs or fees, which would be the one in force after the transition period has ended.



- Once the transition period has ended, the **VAT Directive** would also apply for a five-year period to the rights and obligations of parties subject to taxation under operations between a Member State of the EU and the UK starting before the end of the transition period.
- Another date that should be considered for VAT purposes is March 31, 2021, set as the deadline for requesting the return of VAT paid in the UK by a company established in a Member State of the EU, and vice versa.
- December 31, 2021, is the deadline for altering any VAT declarations that might have been filed in the UK for services provided in a Member State of the EU, and vice versa.
- As in the provisions on customs and VAT aspects, 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 end of the transition period.

The body of 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 could start new administrative procedures relating to state aid granted before the end of the transition period. This possibility is important because the European Commission has been using the state aid procedure as a type of “negative harmonization” procedure for direct taxation. According to this, it will be important to consider that, in principle, the UK will effectively cease to be classified as a Member State on January 1, 2021, once the transition period has ended. From then on, for the effects of the domestic regulations of the Member States, the provisions applicable to other Member States of the EU (including those transposing directives into national legislation or establishing specific tax treatment for these states) could cease to apply to the UK.

It should be emphasized that the new version of the Agreement has changed the wording of Annex 4 to the Protocol on Ireland and Northern Ireland (the “**Protocol**”). This amendment means the Agreement no longer contains the commitment of the EU and the UK to global standards of transparency and the exchange of information, fair taxation, the principles of the BEPS (Base Erosion and Profit Shifting) Plan of the OECD, and 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 the field of taxation** and the **Tax Avoidance Directive**.

The Protocol is not amended in relation to Gibraltar, whereby Spain and the UK would commit to establishing a system of cooperation achieving total transparency in matters of taxation and the protection of the financial interests of all parties. Express mention is made to the establishment of a system of administrative cooperation for resolving tax residence



disputes. It also contains a commitment to OECD standards, particularly within the scope of harmful tax practices, bearing in mind the participation of Gibraltar in the OECD inclusive framework relating to the BEPS Plan.

Any conventions for the avoidance of double taxation signed by the UK and the Member States of the EU would not be affected by the Agreement. Therefore, provided there are no complaints by any of the contracting states, their provisions will continue to apply. To clarify, in principle, Brexit would not affect the current allocation of tax powers between the Member States and the UK in the taxation of dividends, interest, royalties, capital gains, yields from employment, 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) would apply for up to five years after the end of the transition period to certain claims (including not only the amounts due before the end of the transition period, but also any claims relating to transactions that took place before the end of the transition period, but which trigger amounts receivable afterwards).

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