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# Brexit.

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Preparing your business
for a new EU–UK relationship

# Introduction

# The UK's Departure from the EU on January 31 2020 began a new phase referred to as "transition arrangements" which will end on December 31 2020. After this date, the UK will be outside the EU single market and customs union.

Regardless of whether a new UK-EU trading relationship is agreed between the two sides, this change will have an impact on businesses across the UK, regardless of whether you trade internationally, or not.

This guide is designed to help PPA members prepare for those changes and should be read in conjunction with government guidance, published on the gov.uk website. We have partnered with PPA Associate Member, Lewis Silkin LLP, to create this guide which is an update on previously issued document planning for the potential of a 'no-deal' outcome.

In this document, we consider five of the most significant areas for potential change for publishers: immigration, intellectual property, data, employment and company law; aiming to equip you with the information you need to get your business ready for the end of the transition period.

I know many of you will be waiting for clarity on the UK-EU trade relationship, and the outcome of ongoing talk, before investing further in planning for Brexit. However, there are steps you should take now, which will be required whatever the outcome, in order to minimise risk to your business in the new year.

We have tried, where possible, to give practical advice in this guide and answer the most frequently asked questions. Further information about preparing for the new rules can be found at www.gov.uk/transition. If you have additional questions please do not hesitate to contact the PPA team, who will be pleased to direct you towards appropriate resources, or connect you with PPA Associate Members and other advisers who can help.

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# About **The PPA**

# The Professional Publishers Association (PPA) has been synonymous with magazine and business media for over 100 years. Today our membership is made up of modern, multi-platform media businesses carving out a future defined by trusted, quality content.

We represent, champion and support around 250 companies, ranging from consumer magazine publishers to business-to-business data and information providers, customer magazine publishers and smaller independents.

Whether on the page, online, or face-to-face, our members create professional, inspirational and influential media content that engages and entertains audiences.

As the voice of professional publishers for over 100 years, the PPA is committed to ensuring our members have the tools to evolve into dynamic, multi-platform media companies.

Our work today is built around core four pillars – championing content, sharing knowledge, celebrating success, and reducing risk to support the broad spectrum of companies within the vibrant UK's publishing sector.

Any company or association with the common commitment of working towards a prosperous multi-platform media industry should join us. We bring our members together to unlock valuable connections that foster creativity and commercial successes. We also welcome suppliers to the industry as Associate Members.

For more details please visit ppa.co.uk

# 01 Immigration

## WHAT COULD PUBLISHERS DO NOW TO PREPARE FOR THE TRANSITION PERIOD TO END WITHOUT A TRADE DEAL?

### Remind employees to apply under the EU Settlement Scheme

Only EEA citizens who are already resident in the UK on 31 December 2020 will be eligible to apply under the EU Settlement Scheme. They and their family members who are resident in the UK by 31 December 2020 will need to apply under the scheme by 30 June 2021 to protect their lawful immigration status in the UK.

EEA citizens and their family members who've lived in the UK for five years or more at the date of application can apply for 'settled status' [1]. Those who have not been living in the UK for five years will be granted 'pre-settled status' until they have reached the five-year threshold (when they will be granted settled status). Irish citizens are not required to apply under the scheme due to the common travel area arrangements but may do so if they wish. Non-EEA family members of Irish citizens should consider applying under the scheme as its provisions are much less onerous and significantly less expensive than applying under domestic immigration laws.

EEA citizens and their family members who hold British citizenship or Indefinite Leave to Remain do not have to do anything to protect their rights after the end of the transition period. However, those with Indefinite Leave to Remain may wish to apply under the EU Settlement Scheme as this would mean their status would only lapse after a continuous absence of five years from the UK (or four years for Swiss nationals and their family members), instead of two. Those with documents issued under the EEA Regulations must swap their entitlement directly for status under the EU Settlement Scheme by 30 June 2021.

### Bring forward start dates where possible

Try to manage the recruitment pipeline where possible to ensure that proposed new employees who are non-Irish EEA citizens enter the UK by 31 December 2020.

### Provide support for British citizens

The European Commission has asked all member states to provide residence permits to British citizens living in their countries by 31 December 2020, but long-term arrangements will vary from country to country. The UK-EU Specialised Committee on Citizens' Rights has published a summary[2] of the position in each country. In some cases, arrangements have not yet been finalised or may be subject to change, so developments will need to be monitored and specific advice obtained in each country.

1 www.lewissilkin.com/en/news/home-office-confirms-details-of-the-full-eu-settlement-scheme- roll-out

2 www.gov.uk/government/publications/joint-report-on-the-implementation-of-residence-rights-under-part-two-of-the-withdrawal-agreement

# 01 Immigration

## WHAT HAPPENS AFTER 31 DECEMBER 2020?

### What will happen to freedom of movement?

Freedom of movement will end at 11 pm on 31 December 2020.

Once freedom of movement has ended, any EEA citizen who is not eligible under the EU Settlement Scheme will need to apply under the post- Brexit immigration system. [3]

### What about bringing family members to the UK?

Family members who have a relationship with the EEA citizen by 31 December 2020 but are not living in the UK at that date, as well as children born abroad after 31 December 2020, will need to apply under the EU Settlement Scheme to come to the UK. There is no application deadline however they must continue to have the relationship with the EEA citizen at the date they apply.

Other than children born abroad, family members who establish a relationship after 31 December 2020 with an EEA citizen who has status under the scheme will have to make an application under the family categories of the UK immigration system. An exception is that the spouse or civil partner of a Swiss citizen will be eligible to apply under the EU Settlement Scheme where marriage or civil partnership occurs by 31 December 2025.

### Business travel to the EEA and Switzerland

The rules for British citizens travelling to Ireland will not change and they will be allowed to undertake any activity without restriction. After Brexit, British citizens travelling to the other EEA countries or Switzerland will be exempt from visa requirements for up to 90 days in a 180 day period. This is for visits only, including attending business meetings. However, British citizens will be unable to undertake paid work, so you'll need to understand the scope of the proposed activities on each trip and obtain any required work permissions if these go beyond the activities allowed for visitors.

It will also be important to calculate the time spent in the Schengen Area on a rolling basis to ensure the 90-day maximum stay is not exceeded. British citizens will also need to have a passport which is valid for at least six months from the time they enter the EU. Note that some British passports are issued for more than 10 years in total but only the first 10 years of validity can be counted towards this six-month requirement.

3 www.gov.uk/guidance/new-immigration-system-what-you-need-to-know

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## WHAT HAPPENS AFTER 31 DECEMBER 2020?

### Business travel to the UK

Irish nationals will continue to be able to undertake business travel to the UK without restriction indefinitely. Other EEA/Swiss citizens will also be able to undertake business travel to the UK without restriction in the same way as they do now until 31 December 2020. From 1 January 2021, they would need to meet the requirements for non-visa national visitors under the post-Brexit immigration system.

# 02 Intellectual Property

## HOW WILL COPYRIGHT CHANGE IN THE EVENT OF A NO-DEAL BREXIT?

Copyright is a national right, but much of UK copyright law is derived from the EU framework. There are references in UK law to EU cross-border copyright arrangements that provide reciprocal protections between EU Member States. The Government has introduced regulations which will remove or correct references to the EU, EEA or Member States in our copyright law.

Despite a no-deal Brexit, the international European treaties on copyright which require all signatory countries to protect works originating in any other treaty country to a minimum standard will still apply. The UK's participation in such treaties as the Berne Convention and the TRIPS Agreement is not contingent on membership of the EU. In recent years the UK courts have begun to move away from the EU's more expansive application of copyright and so post-Brexit it is predicted that the UK courts may return to a slightly more restrictive approach in determining what is protected by copyright and consequently, infringement.

There are certain aspects of copyright law that will change with a no-deal Brexit as the UK will no longer be a party to EU wide harmonising copyright laws. For example, there are European rules in place in relation to orphan works – copyright works where the right holder is unknown or untraceable – which allow cultural heritage institutions (think libraries, museums, archives etc.) to digitise and make such works available online across EEA Member States without the permission of the rights holder. That rule will no longer apply in the UK, meaning a risk of claims of copyright infringement if they continue to upload, or don't take down, orphan works from their online collections. There is a separate UK orphan works licensing scheme, but that will only apply to users in the UK.

Expect changes too to the way on-demand services work. The EU Portability Regulation currently ensures viewers across the EEA have unrestricted access to paid subscribed online content services, like on-demand streaming services such as Netflix or Spotify, when they travel temporarily to another EEA state, in the same way they would if they were at home. After Brexit, this won't apply in the UK or for UK consumers travelling within the EEA anymore. That does not mean that service providers cannot offer cross-border portability if they want to, but the provider will need permission from the owners of the content they provide.

If a UK publisher is showing video content on its website which is embedded from, for example, YouTube, it will be largely ancillary e.g. by way of illustration, and therefore the publisher is unlikely to come under the definition of an 'online content services provider', even if access to the website is limited to paid subscribers.

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If that content originates from the EEA, the content owner may decide to restrict access in the UK, and therefore it may be necessary to obtain additional permission from the content owners to ensure the content is still available in the UK. However, in reality, if that EEA content owner has already permitted its content to be shown on the UK publisher's website, it is unlikely it will remove that permission following Brexit.

Further, in a no-deal Brexit, without changes to UK legislation, UK-based broadcasters and video on- demand services that provide services akin to a television schedule would no longer be afforded the freedom of reception throughout the EU for their subscribers who temporarily move within the EU, without requiring the authorisation for each country of destination it wishes to transmit services, subject to variations of national laws.

Brexit will also mean changes to sui generis database rights, which give database owners the right to stop unauthorised copying or extraction of data from their databases. After the end of the transition period, British businesses may find their rights are unenforceable in the EEA, although their databases that are already protected in the EEA will continue to be protected for the rest of their standard duration. The UK will introduce its own version of database rights from 1 January 2021 for new databases created by UK citizens, residents or businesses, but it will only provide protection in the UK. That might mean turning to other ways of protecting databases that have involved significant time or financial effort to produce – potentially in the form of licensing agreements instead. If sufficient levels of originality can be shown, databases may also be protected by copyright – this alternative protection will not change post-transition period.

Recent EU Directives, Copyright in the Digital Single Market and Copyright relating to Online Transmissions and Retransmissions of TV and Radio content are required to be implemented into Member States by 7 June 2021. This would only become relevant if the transition period were extended but in view of the pandemic this cannot be ruled out.

**What's next for trade marks post-Brexit?**

After leaving the EU on 31 January 2020 the UK has been subject to a transition or 'implementation' period set out in the Withdrawal Agreement. This ultimately preserves the status quo until 11pm on 31 December 2020. Any post-transition changes will come into force on 1 January 2021, notwithstanding any deal that may be agreed by then.

**What will happen to EU Trade Mark?**

Any existing EU Trade Mark Registration will continue to be protected in the UK by the automatic creation of an equivalent UK Registration on exit day.

The comparable UK rights will be created at the end of the transition period and owners of existing registrations will be notified of the

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creation of the equivalent Right. It will be possible to opt-out if you do not want an equivalent UK Registration. The existing EU will continue to be in force in the remaining member states of the European Union.

Granted EU designations of International Registrations under the Madrid Protocol (Trade Marks) will be converted automatically into UK Registrations and not UK designations. Subsequently, owners of EU Trade Mark Registrations and Community Design Registrations and the newly created equivalent UK Trade Mark Registrations and UK.

Design Registrations will have to pay separate renewal fees for the existing EU Registrations as well as the newly created equivalent UK Registrations. The UK renewal fees will be payable if the renewal date falls after exit day, even if the renewal fee for the corresponding EU Registration was paid before the exit day.

**What will happen to our pending EU Trade Mark?**

Applicants for pending EU Trade Mark Applications or pending designations of International Registrations will have to reapply in the UK within nine months of the exit date in order for their EU / International designation to be converted into an equivalent UK Application which will keep all the filing, priority and seniority dates of the original Application. **Applicants will not be notified of the need to reapply.**

EU designations of International Registrations will be converted into UK national applications and not UK designations of the International Registration.

**Applicants will have to pay UK filing fees** as part of the process of creating an equivalent pending UK Application from the EU or International Registration.

**What about Community Registered Designs?**

UK registered designs are unaffected by Brexit however Registered Community Designs (RCD) will not longer give protection in the UK after the end of the transition period. The UK will have a comparable system when Community designs are protected by an equivalent UK rights post-transition.

From 1 January 2021 rights holders will automatically received a comparable 're-registered design' at the UKIPO on very similar basis to the trade mark system. Pending applications will not automatically be turned into applications for the comparable re-registered design so rights holders will have a nine month grace period to apply for a re-registered design, similar to the process for trade marks.

Applicants for pending RCD or pending designations of International Registrations will have to reapply in the UK within nine months of the exit day in order for the RCD to be converted into a UK equivalent, and maintain the filing, priority and seniority dates of the original application.

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**What protection will there be for Unregistered UK and Community Design Rights?**

From the end of the transition period, only residents of and businesses formed in the UK (and other specified qualifying countries) will be entitled to hold the 'old-style' UK unregistered design right. Disclosure in the EU will no longer create such UK design rights.

Unregistered Community Design Rights (UCD) will no longer give protection in the UK at the end of the transition period.. However, holders of UCDs will automatically receive continuing protection in the UK via a 'Continuing Unregistered Design' for the remainder of the three year term of protection. The UK will create a new 'Supplementary Unregistered Design' to give similar protection in the UK to that which the UCD provides in the EU from 1 January 2021 onwards. However it will be important for a rights holder to consider where it first discloses a new design to maximise relevant protection; initial disclosure in the EU will no longer create a right in the UK. This could create a number of legal issues in seeking to enforce design rights across Europe post-Brexit.

**What will happen to pending UK court proceedings based on an EU Registered Trade Mark, Community Design or Community Unregistered Design Right?**

Provision has been made so that any proceedings based on an EU Registered Trade Mark or Registered Community Design or International registration designating the EU or Community Unregistered Design Right that are pending on exit day may continue as if the UK were still a Member State of the European Union and under the provisions of the European Regulations governing those rights.

Counterclaims for invalidation or revocation of the EU Trade Mark on which any pending case is based may have to be transferred to an EU court. The UK court may still issue a declaration of invalidity against or revoke the equivalent UK registration created on exit day.

The management of ongoing legal disputes based on an EU Trade Mark / Community Design Registration right will depend on the particular details of each case. You will need to take advice on how the new provisions affect any specific case.

**Exhaustion of rights**

Any IP rights which are exhausted in the EU or the UK on or before 31 December 2020 remain exhausted from 1 January 2021.

Once the transition period comes to an end, the rights of IP-owners in the EEA will no longer be exhausted by goods being put on the market in the UK, and so their rights will be enforceable against such goods if they are 'parallel' imported from the UK into the EEA. By contrast the UK has indicated that it will continue to recognise EEA exhaustion after the implementation period end date, so the rights in IP-protected goods first placed on the EEA market by, or with the

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consent of, the right holder would continue to be considered exhausted in the UK. This would, for the time being, allow continued 'parallel importation' from the EEA into the UK.

**Representation before the UK IPO and EUIPO**

The entitlement for UK-qualified/based lawyers and attorneys presenting parties before the UKIPO will not change, but will be very limited before the EUIPO after the transition period ends. It will be important to check that there is appropriate representation in place before the EUIPO. Companies using non-UK based representatives should ensure they have a UK address for services when making new UK applications and conducting UKIPO proceedings.

**Trade marks and Community designs in the EUIPO**

Any opposition, invalidation or revocation action against an EU trade mark or Community design that is based solely on a UK right that is pending before the EU IPO on exit day will be refused automatically on the basis that the UK right is no longer a valid ground of objection.

**Domain names**

Businesses established in the UK but not in the EU, and UK-resident individuals who are not EU citizens, will not be eligible to register new .eu domain names after the end of the transition period. Existing .eu domain names held by businesses or individuals will be subject to withdrawal and revocation unless a legal basis can be shown for continuing to hold such domains. If the necessary residency/citizenship in the EU cannot be shown, businesses or individuals should plan for migration of any key services and websites reliant upon .eu domain registrations to different domains.

# 03 Data

## WHAT WILL BE THE SITUATION FOR DATA TRANSFERS IN THE EVENT OF A NO-DEAL?

A no-deal/no adequacy scenario at the end of the transition period would pose a number of challenges for data protection issues – particularly in relation to data transfers. These challenges are not insurmountable, but publishers that transfer personal data into the UK from the EEA will need to put mechanisms in place to ensure data flows are not interrupted.

There has been much discussion about the impact of the end of the transition period on a company's personal data flows in and out of the European Union. Even with "no-deal" and no adequacy at the end of transition period, this will not be an insurmountable issue.

### Five steps to prepare

The European Data Protection Board's ("EDPB") information note on the implications of a no-deal Brexit for data transfers from the EEA to the UK remains relevant.[4] Should the transition period finish without an agreement in place and/or adequacy decision, the UK will become a third country. As a result, data transfers to the UK would need to be based on one of the permitted data-transfer instruments, and organisations should prepare accordingly. The EDPB set out five steps that organisations transferring data to the UK should take in preparation for no-deal at the end of the transition period:

- Identify what processing activities will imply a personal data transfer to the UK.
- Determine the appropriate data-transfer instrument for your situation.
- Implement the chosen instrument to be ready for the end of the transition period.
- Indicate in internal documentation that transfers will be made to the UK.
- Update your privacy notice accordingly to inform individuals.

The permitted data-transfer instruments are EU-approved model clauses; binding corporate rules; a code of conduct or certification mechanism; or derogations which may allow data transfers under certain conditions.

The EDPB notes the UK Government's indication that it will continue to permit personal data to flow freely from the UK to the EEA and advises organisations to consult its website and the ICO's website regularly.

### Intra-group transfers?

As part of their GDPR compliance actions, data controllers should already be aware of their data flows around the EU and the world, including EEA>UK data flows.

Many of these controllers will also already have sophisticated intra-group transfer mechanisms in place covering data flows. These companies have already mapped their data flows, so adding the post-transition period UK in a different

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capacity into their intra group agreements should be a relatively straightforward task. For example, if you already send data to Australia from France via an intra-group agreement with standard contractual clauses ("SCC"), broadly you need to do the same for your UK entities or simply add these UK entities to an existing agreement.

For those entities that have not yet mapped their data flows intra-group, then a first step (and really one that should have taken place already regardless of Brexit) is to map flows of data from the EEA>UK.

**Third-party processors? (And third-party controllers?)**

In terms of controller to processor relationships, many UK processors do receive personal data from the EEA. Again, they should already know which of their clients send them data from the EEA, and it is likely that controller to processor terms reflect this – so if there is "no-deal" and no adequacy decision at the end of the transition period, then the parties will put in place adequate safeguards for EEA>UK transfers as necessary. It is then not a particularly onerous task to put in place SCCs, although commercially the other party may take the opportunity to renegotiate other terms.

From a controller to controller perspective, it may be necessary (as with "intra-group" transfers) to put in place SCCs where previously they were not required.

**What about UK to EEA transfers?**

The UK Government has taken a pragmatic approach to this issue, setting out in their "no-deal" paper on data protection that:

*"You would continue to be able to send personal data from the UK to the EU. In recognition of the unprecedented degree of alignment between the UK and EU's data protection regimes, the UK would at the point of exit continue to allow the free flow of personal data from the UK to the EU. The UK would keep this under review."*

The ICO has published guidance[5] on transfers from the UK to other countries (including to the EEA). For data transfers to the EEA the ICO states:

*"The UK government has stated that, after the end of the transition period, transfers of data from the UK to the EEA will be permitted. It says it will keep this under review."*

So in essence, for now at least, no action really needs to be taken with regards to data flows to the EEA. But even for transfers within an adequacy "bubble", our strong advice is still that a data-sharing agreement is put in place – although we understand that many companies across the EEA still choose not to document formally intra-EEA or adequacy decision country transfers.

Further, arguably, privacy notices should also be updated to explain that data is transferred from

5 ico.org.uk/for-organisations/data-protection-at-the-end-of-the-transition-period/data-protection-at-the-end-of-the-transition-period/the-gdpr/international-data-transfers/

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the UK to the EEA under a UK "adequacy decision" (in addition to describing any transfers to other countries – as should already be described).

**Ensuring SCCs are valid**

In July 2020 Max Schrems' challenge to SCCs and the EU-U.S. Privacy Shield framework was decided by the Court of Justice of the European Union. The Court invalidated Privacy Shield and validated SCCs (and, by implication, binding corporate rules) as valid transfer mechanisms provided that those mechanisms are able, in practice, to provide a level of protection essentially equivalent to the GDPR. This requires increased due diligence on both the recipient of the data, and the laws of the data recipient's country to determine whether the terms of the transfer mechanism are able to be complied with in practice. Supplementary measures may also need to be put in place (such as additional contractual safeguards between the parties) to protect personal data from excessive or unjustified access by foreign law enforcement or government agencies.

The SCCs themselves have not been updated for GDPR compliance. New versions should be released by the European Commission in the near future (but "near" could easily mean 6-12 months or longer).

This means that use of the current SCC model could result in future changes being required when the European Commission changes them (although one assumes grandfathering provisions will apply). But if this happens, it will not just be UK companies that are concerned but many 100,000s of global companies as well. The EU will essentially be closing its borders to data and the main victim will be consumers with regards to their access to, for instance, US providers – as such it seems unlikely this will happen.

**An exploitable chink?**

The ICO's paper on extra-EU transfers8 also contains an idea that data transfer restrictions under the GDPR do not apply where the recipient of personal data is directly bound by the GDPR. If this is correct, then both a "no-deal" or "orderly" end of transition period are irrelevant – as the majority of processing by UK companies will be covered by the GDPR (either under Article 3(1) or 3(2) or even, arguably, just by virtue of the fact that the UK has incorporated GDPR into its domestic law) then no transfer mechanisms will need to be put in place.

**Will adequacy be granted to the UK?**

Even in the event of a "no-deal", the UK will still seek an adequacy decision from the European Commission (as envisaged by the Future Relationship document). A successful adequacy decision would mean the UK was deemed to have an adequate level of data protection and data could flow to the UK from the EEA without any further safeguards.

This will, of course, take time, meaning some of the "no-deal" actions set out above may have to be put in place. Further, there is no guarantee

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that the UK will be adjudged as having adequate data protection standards. The main worry discussed by some commentators is over the width of the Investigatory Powers Act – i.e. can security and police forces look too easily at our personal data in the UK?

In the meantime, if there is no-deal, from 1 January 2021 EEA data flows into the UK will need to be subject to additional safeguards. All businesses transferring personal data from the EEA to the UK will have to ensure there is a compliant data-sharing mechanism or derogation in place.

**What decisions will the UK make about the adequacy of other countries?**

In the future, the Government will potentially make adequacy decisions about other third countries. An adequacy decision confirms that a particular country or territory (or a specified sector in a country or territory) or international organisation, has an adequate data protection regime. This could be good news for many former commonwealth countries with advanced data protection regimes (e.g. Australia and Singapore).

Crucially the UK government has confirmed that it:

*"intends to recognise the EU adequacy decisions which have been made by the European Commission prior to the exit date."*

This will allow UK transfers to Andorra, Argentina, Canada (commercial organisations), Faroe Islands, Guernsey, Israel, Isle of Man, Japan, Jersey, New Zealand, Switzerland, and Uruguay.

EU-Korean talks are ongoing but it is likely that either the Government will just recognise Korea's data protection regimes itself or, once the European Commission does confirm adequacy, the Government will recognise those decisions.

**Other appropriate safeguards – standard contractual clauses**

The ICO states that:

*"If there is no adequacy decision which covers your restricted transfer, you should consider putting in place one of a list of appropriate safeguards to cover the restricted transfer. For most businesses, a convenient appropriate safeguard is the use of standard contractual clauses. The UK government intends to recognise European Commission-approved standard contractual clauses as providing an appropriate safeguard for restricted transfers from the UK".*

Note though that the CJEU Schrems II decision will continue to apply in the UK and impose additional obligations on parties to ensure the validity of SCCs (such as conducting due diligence on the recipient and the recipient's country and imposing "supplementary measures" on the recipient where necessary.

The government's technical note says that provision will be made so that the use of Standard Contractual Clauses (SCCs) that have previously been issued by the European

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Commission will continue to be an effective basis for international transfers in a no-deal scenario. Existing SCCs will be valid and the Government will have the power to issue new clauses after the transition period.

This is good news and again we would expect that if and when the European Commission changes the standard contractual clauses that the Government will recognise them too.

The ICO also discusses the other standard safeguards and most crucially states that:

*"The UK government will recognise binding corporate rules authorised under the EU process before the end of the transition period as ensuring appropriate safeguards for transfers from the UK."*

**European Representatives (and UK Representatives?)**

The ICO also recommends that if you are a UK based controller or processor without any offices, branches or other establishment in the EEA and you offer goods or services or monitor the behaviour of individuals in the EEA, you need to consider your Article 27 obligations to appoint an EU Representative (i.e. a contact point for EU data subjects). This representative will need to be set up in an EEA state where some of the individuals whose personal data you are processing in this way are located. Privacy notices will need to be updated.

The UK GDPR will replicate Article 27 of the EU GDPR to require controllers based outside the UK to appoint a representative within the UK where there is no establishment in the UK. There are multiple companies offering to be representatives across the EEA and the UK.

**Summary**

The ICO guidance recommends (1) taking stock, (2) focusing on EEA to UK transfers and (3) if necessary ensuring adequate safeguards are in place.

Our advice would be: don't panic, review your EU/ UK data flows and hope for the best in terms of a deal. But if the worst happens, rest assured the issues are not insurmountable – EU/UK model clauses are not excessively complex to put in place or to amend to reflect the UK's new position as a third country post transition period (although they will likely require "supplementary measures" to be put in place and a risk assessment undertaken to be considered valid).

# 04 Employment

## WHERE ARE WE AT?

During the transition period, EU employment law continues to apply and the UK has to comply with any new decisions of the European Court of Justice (ECJ). Once the transition period ends on 31 December 2020, there will be more flexibility to depart from EU law – but ultimately the UK may need to keep in regulatory check with the EU as a condition of reaching a trade deal.

## HOW IS EMPLOYMENT LAW CHANGING?

### Employment case law

Once the transition period comes to an end, the European Union (Withdrawal) Act 2018 (the "Withdrawal Act"), will convert all pre-Brexit EU employment law into UK law. New ECJ decisions after the end of the transition period will not be binding on UK courts or tribunals, although could be taken into account if relevant. However, decisions of the ECJ during the transition period will be adopted into and retained in UK law, which means that they will remain binding unless and until they are overturned. On the whole, UK courts are likely to continue to respect most ECJ rulings in any event, as long as UK and EU legislation remains the same.

The Supreme Court, Court of Appeal and other specified appellate courts will be able to depart from retained ECJ decisions if it seems right to do so. The Employment Appeal Tribunal is not included as an appellate court which is able to depart from retained EU case law, which is likely to result in less volatility and uncertainty in employment law than if it had been decided otherwise.

### Directives

The UK was required to implement the revised Posted Workers Directive, which all EU member states had to transpose into their national laws by July 2020 i.e. before the end of the transition period. This gives additional rights to workers who

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are posted from one EU member state to another to carry out their work. The UK government took the position that it was already compliant with the revised Directive, except in respect of an obligation on a hirer to inform a temporary work agency of the posting of an agency worker. The Posted Workers (Agency Workers) Regulations 2020 (SI 2020/384) were enacted to modify the Agency Workers Regulations 2010 in this respect. The Regulations came into force on 30 July 2020 and will automatically expire at the end of the transition period.

As matters currently stand, the UK will not be required to adopt any other EU Directives whose implementation deadline falls after the end of the transition period – subject to any insistence on the EU's part of regulatory unity for a trade deal. This includes three key new EU Directives, namely the Transparent and Predictable Working Conditions Directive, the Work Life Balance Directive and the Whistleblower Directive. [6]

The UK, however, has already committed to implementing some aspects of the Transparent and Predictable Working Conditions Directive, is one of the few EU countries to already have whistleblower protection and already provides some of the rights established under the new Work Life Balance Directive.

6 www.lewissilkin.com/en/insights/the-eu-gets-transparent-and-predictable
www.lewissilkin.com/en/insights/the-eu-adopts-a-work-life-balance-directive
theword.iuslaboris.com/hrlaw/whats-new/uk-the-new-whistleblower-directive-and- treatment-of-whistleblowers-in-eight-european- countries

**Longer-term changes to employment law**

The revised Political Declaration, which was intended to serve as the starting point for the EU/UK trade talks, says that the UK is committed to maintaining a "high standard" of workers' rights. However, this does not mean full ongoing alignment with EU rights. In fact, the current government has emphasised that it does not intend ongoing regulatory alignment. Equally, the EU has been clear that regulatory alignment is an issue that goes hand in hand with market access. It therefore remains to be seen what trade deal can be negotiated, and how far concessions on either side on the issue of regulatory alignment on workers' rights are necessary to clinch it.

If no trade deal can be negotiated with the EU, the UK will not then need to keep pace with any new EU Directives and could potentially start dismantling some EU-derived employment rights. Historically, supporters of leaving the EU have cited abolishing working time legislation, placing caps on discrimination damages and repealing the Agency Workers Regulations as among the liberalising measures that could be taken, although none of these featured in the Conservative party's manifesto for the December 2019 general election. It is also very unlikely that rights to paid holiday would be scrapped altogether.

In Northern Ireland, under the new Northern Ireland protocol, EU Equality Directives and related case law will remain binding even if no trade deal can be negotiated. This has the potential to result in further divergence between

# 04 Employment

Northern Ireland and the rest of the UK, although there are already several differences between Northern Irish employment law and that applicable to Great Britain.

In the longer term, we might also expect to see collective redundancy consultation being abolished or made less onerous and the restrictions on changing terms after a TUPE transfer (a regulated transfer of employees to a new employer) being lifted (although we are unlikely to do away with TUPE altogether).

**Discrimination rights**

Remember that UK law prohibits workplace discrimination on grounds of nationality and national origin. In the (hopefully unlikely) event of any EU citizen experiencing abuse or harassment in your workplace, you would need to be ready to respond under your anti-harassment policies. You may want to check that they already cover nationality as well as race.

Interestingly, UK equality legislation goes further than EU minimum requirements in explicitly preventing nationality discrimination in the workplace. This is one of a number of instances where UK law provides more rights than the EU minimum and illustrates that, although the UK may dismantle some EU-derived employment rights in future, there are still likely to be areas of employment law where the UK goes further than the EU.

## WHAT COULD PUBLISHERS DO NOW AS THEY PREPARE FOR THE TRANSITION PERIOD TO END?

**Check your European Works Councils arrangements**

Be sure to have pre-designated your new representative agent if your EWC is currently located in the UK. If your EWC is (or will become) located in another EU country, you will need to decide what to do about your existing UK representatives after Brexit (see here for the EU Commission's latest position). If you are currently negotiating an EWC agreement, or if you have a EWC operating under the default 'subsidiary' requirements, consider relocating your arrangements now if you've not already done so.

**Follow the legal requirements if you are considering restructuring or relocation**

If you are considering closing down a business, depending on the outcome of trade talks, remember that you may need to consult on the business case for closure before any decision to close is taken. And, secondly, employees should be offered the opportunity to move with the business if it is relocating. Any redundancies linked to a restructuring will mean consultation.

# 05 Company

There will be mercifully few changes in company law for private or overseas companies on Brexit day under current legislation. The changes outlined here are relevant to all publishers that are private companies incorporated in England and Wales or overseas companies incorporated in the EEA (EEA overseas company). There are similar provisions for LLPs.

**What changes will there be to company administration?**

- EEA overseas companies will see the removal of reduced requirements as to information filings, and disclosures in business communications and websites and names (as compared with a non-EEA overseas company). Such companies will have three months to address the changes.
- For an EEA company that is a director or secretary of a UK company, there will also be the removal of reduced filing requirements (as compared with a non-EEA corporate officer). There will be three months to supply the additional information.
- In relation to political parties and expenditure, there will need to be a removal of references to the EU, so the requirements for shareholder authorisation will only apply to UK elections and referendums.
- There will be no more EU cross-border mergers involving a UK company as a result of the revocation of the EU cross-border mergers regime.

**What changes should publishers expect to company accounts?**

- For EEA overseas companies Brexit will mean the removal of the reduced requirements (as compared with other overseas companies) as to the production, audit and filing of their accounts.
- Current accounting exemptions will be limited for UK companies with EEA parent companies as follows:
  - an intermediate UK parent company with an immediate EEA parent may no longer be exempt from producing group accounts from January 2021; and
  - UK registered dormant companies with EEA parent companies will need to file individual annual accounts for accounting periods beginning from January 2021.
- Another change will be the reduced scope of the exemption from audit for a UK subsidiary of an EEA parent. This will only be available to a UK subsidiary of a UK parent.

**What action should publishers take?**

Companies incorporated in the UK and EEA overseas companies will need to address the above-noted changes, where relevant to them.

A UK company should also seek local law advice as to the effect of its connections with any of the remaining EU Member States (EU-27); for example, if the company has an established place of business in any of the EU-27. UK LLPs would have similar work to do.

# 06 PRACTICAL TAKEAWAYS/ ACTION POINTS

## 1

**Have conversations with your European employees about their future in the UK**

Only EEA citizens who are already resident in the UK on 31 December 2020 will be eligible to apply under the EU Settlement Scheme. Try to manage the recruitment pipeline where possible to ensure that proposed new employees who are non-Irish EEA citizens enter the UK by 31 December 2020. The European Commission has asked all member states to provide residence permits to British citizens living in their countries by 31 December 2020, but long-term arrangements will vary from country to country. If you have employees who are British citizens working elsewhere in Europe, discuss their status with them and make any necessary arrangements.

## 2

**Think about additional protections for copyright works**

Read our advice on how copyright law is changing, and in the absence of some reciprocal European arrangements, consider other methods of protecting your work. In recent years the UK courts have begun to move away from the EU's more expansive application of copyright and so post-Brexit it is predicted that the UK courts may return to a slightly more restrictive approach in determining what is protected by copyright and consequently, infringement.

# 06 Practical Takeaways/ Action Points

## 3

### Review your EU/UK data flows

A no-deal/no adequacy scenario at the end of the transition period would pose a number of challenges for data protection issues – particularly in relation to data transfers. These challenges are not insurmountable, but publishers that transfer personal data into the UK from the EEA will need to put mechanisms in place to ensure data flows are not interrupted.

## 4

### Identify your processing activities and update your privacy notices

Identify what processing activities will imply a personal data transfer to the UK and determine the appropriate data-transfer instrument for your situation. Your privacy notices will need to be changed accordingly.

## 5

### Now is the time to audit your trade mark and design portfolios

Be prepared for the creation of equivalent UK Registrations for your existing EU Trade Mark and Community Design Registrations. Two Registrations will mean two sets of renewal fees will need to be paid. You may want to opt-out of the creation of the equivalent UK Right if you already have an existing UK Registration.

## 6

### Prepare to re-file pending applications

Be ready to re-file for any EU Trade mark Applications and Community Design Applications which are still pending on the exit day. A request to create an equivalent UK Application must be filed and the UK Application fees must be paid by **within nine months of the date the UK leaves the EU**. It may not be needed if you already have a suitable Registration in the UK. **Applicants will not be notified of the need to reapply.**

# 06 Practical Takeaways/ Action Points

## 7

### Check your European Works Councils arrangements and ensure you follow the law in you are considering restructuring or relocation

Be sure to have pre-designated your new representative agent if your EWC is currently located in the UK. If your EWC is (or will become) located in another EU country, you will need to decide what to do about your existing UK representatives after Brexit. If you are considering closing down a business, depending on the outcome of trade talks, remember that you may need to consult on the business case for closure before any decision to close is taken. And, secondly, employees should be offered the opportunity to move with the business if it is relocating. Any redundancies linked to a restructuring will mean consultation

## 8

### Keep an eye on the length and nature of business trips

The rules for British citizens travelling to Ireland will not change and they will be allowed to undertake any activity without restriction. After Brexit, British citizens travelling to the other EEA countries or Switzerland will be exempt from visa requirements for up to 90 days in a 180 day period. This is for visits only, including attending business meetings. However, British citizens will be unable to undertake paid work, so you'll need to understand the scope of the proposed activities on each trip and obtain any required work permissions if these go beyond the activities allowed for visitors.

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