

A person wearing a blue suit jacket and a black watch is holding a brown leather briefcase. The briefcase has a gold-colored clasp and handle. The background is a light, textured surface.

# RADIUS LAW

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## Brexit

After over 4 years of haggling, the UK-EU [Trade and Cooperation Agreement](#) ('TCA') came into effect on the 31<sup>st</sup> December and ended the transition period.

The headline point is that deal does provide for tariff and quota-free trade in most goods, but services and some key issues including data transfers are still to be agreed.

In the next 10 minutes, we'll give you our summary of the TCA and try to cover some other important legal updates from the past two months.

### Brexit – Focus on Contracts

Whilst tariffs for most goods have been removed, *new customs documentation will be required*. These obligations have been partly mitigated by the mutual recognition of Trusted Trader Schemes and there are some concessions on full declarations in the first six months.

We recommend reviewing contracts to understand whether the seller or the buyer has the responsibility for customs clearance. UK sellers should however note that the HMRC will expect them to provide relevant paperwork, regardless of the contract terms.

Not all goods will be tariff free – there are complex exceptions and requirements. More information is available on the [gov.uk website](#). Electric cars, for example, will only be tariff-free if >40% of value is added in the UK and/or the EU.

Businesses should also note that the TCA has not agreed recognition of conformity assessments. This is likely to mean additional burdens for UK distributors of products manufactured in the EU.

### Brexit – Focus on Dispute Resolution

If the parties have chosen a particular country's law to apply to any dispute, then this is unlikely to be affected by Brexit and generally that *choice will still be respected*.

Which country will have the jurisdiction to hear and enforce a claim is however more complicated in cross-border disputes.

Prior to the 31<sup>st</sup> December the UK was, via its EU membership, a member of the Lugano Convention which provided a system of allocation of jurisdiction and the reciprocal enforcement of judgments. The UK is applying to re-join the Lugano Convention, *but its application may be blocked* and is likely to take several months.

In the interim the UK can fall back on the Hague Convention, but this has gaps. Its membership is

now direct rather than via the EU leaving it unclear whether contracts signed before 31<sup>st</sup> December are covered by it – some businesses are therefore re-signing contracts to remove this risk. The Hague Convention is also limited. It will only apply to contracts containing exclusive jurisdiction clauses and it does not apply to insolvency, consumer or employment disputes. Disputes falling outside of the conventions will be complex and costly.

Until the UK re-joins the Lugano convention, *businesses may prefer to choose arbitration* in their contracts as this is unaffected by Brexit.

## **Brexit – Focus on Data Security**

Membership of the EU allowed the free-flow of personal data to other member states and to countries that the EU deemed data adequate.

There was concern that after the 31<sup>st</sup> December personal data would not be allowed to flow from the EU to the UK without additional safeguards. This 'cliff edge' has been averted for now and the UK has a four-month window (which can be extended to six months) to be awarded an 'adequacy decision'.

UK businesses processing personal data of EEA citizens should also note that they must have an EEA branch, office, establishment or representative in the EEA.

## **Brexit – Focus on Employment**

### **Mobility**

The free movement of people has now ended. Europeans who were in the UK before 1 January 2021 are likely to be able to remain but must apply for settlement status under the EU Settlement Scheme ('EUSS'). The deadline for applications is 30 June 2021. From 1 July 2021, employers must check whether Europeans hold a right to work in the UK.

UK employers employing European staff who are not eligible for the EUSS, must act now on the new points-based immigration system except for Irish nationals, who will not require immigration permission to work in the UK

### **Business trips**

Generally short-term business trips to the EU or UK are allowed, without visas for purposes such as attending meetings and conferences, but trips that involve selling goods or services directly to the public will require a visa. Short term visits without a visa are limited to 90 days in any 6-month period. Some member states may also apply additional restrictions.

### **Level Playing Field**

The UK, to the extent that it materially impacts trade or investment, must maintain and enforce the employment rights that existed on 31<sup>st</sup> December and must not significantly diverge from future EU employment laws.

The UK must also continue to respect the rights set out in the European Convention on Human Rights.

These obligations are likely to restrict UK's ability to reintroduce fees for Employment Tribunal claims.

### **Existing EU derived laws**

All EU-derived laws that have been implemented before 31 December 2020 carry on and must still be interpreted in conformity with the relevant EU law, although the Court of Appeal and the Supreme Court can depart from the European Court of Justice decisions if it 'seems right to do so'. This could lead to some changes on the calculation of holiday pay that have been particularly problematic. The Supreme Court is scheduled to hear three holiday pay cases this year.

### **Social security contributions**

The general rule remains that social security contributions are due in the country in which the employee is working but it may be possible, subject to some detailed rules, to continue to pay social security contributions only in the UK notwithstanding that the employee is temporarily working in an EU country. [HMRC has provided guidance on these new rules.](#)

## **Brexit – Focus on Advertising and Marketing**

### **Trademarks and registered design rights**

Owners of EU trademarks registered before 31<sup>st</sup> December will be granted equivalent UK trade marks. Businesses that have ongoing EU trademarks application have a 9 month grace period to apply for an equivalent trade-mark. Registered Community design rights will be treated in the same way.

### **Patents**

Patents are unaffected by Brexit. European Patent Convention and the European Patent Office (the EPO) that manages it are independent of the EU.

### **Copyright**

Copyright is unlikely to change. Copyright is a national right that each country provides separately. Reciprocal protection for copyright works between the UK and EU is assured by international conventions.

## **Brexit – Focus on Competition Law**

EU competition law will still be applicable to any businesses if their anti-competitive conduct is implemented or produces effects within the EU.

EU block exemptions will also be retained with their current expiry date in adapted form removing specifically EU references (except for the insurance block exemption which is revoked)

Competition rules on trade within the UK will also remain largely the same as the UK Competition Act that has been modelled on European Law.

Similar to employment law, there are obligations to maintain a level playing field so competition law regulation and state subsidy principles must continue to be very similar to EU rules.

## In other news.....

### Wrongful trading laws

Due to the COVID pandemic the Government suspended the wrongful trading laws that impose personal liability on directors found to have over-traded while a company was insolvent. That suspension expired at the end of September 2020 but has now re-introduced and will remain until 30<sup>th</sup> April.

### Subject to contract

A recent case has re-confirmed that correspondence that is marked 'subject to contract' will not create any legal commitment until a formal contract has been made<sup>1</sup>.

### Personal Data transfers

When transferring personal data to a country that does not have an EU Commission approved data adequacy decision, businesses have typically used the EU's standard contractual clauses ('SCC') as a way of making the data transfer lawful. Last year the European Court<sup>2</sup> said that businesses should no longer use SCCs unless they have completed a risk assessment on the data laws of the recipient's country. [The European Data Protection Board has now published a 6-step evaluation process](#) for this purpose.

In addition, the European Commission has published [draft new SCCs](#). Once the SCCs are finalised, (which is expected to happen in 2021) organisations will have a one-year grace period to update their contracts that incorporate the new SCCs.

### Eco-friendly claims

The UK Competition and Markets Authority (CMA) has announced that it will be investigating descriptions and labels used to promote products and services claiming to be 'eco-friendly'. By summer, the CMA aims to produce guidance for the marketing of environmental claims. The UK Government has already issued [guidance](#) on its website on how to make an accurate environmental claims and the UK Advertising Standards Authority (ASA) has produced [rules](#) on environmental claims.

### Justification for discrimination

The Court of Appeal has confirmed that saving costs in order to balance the books can be a legitimate aim which could justify indirect discrimination. In this case<sup>3</sup> the employer had introduced a new pay policy which slowed pay progression and had a disproportionate impact on younger employees.

### Green light for first mass consumer claim

In December the Supreme Court<sup>4</sup> ruled that that the class action against Mastercard relating to alleged overcharging of credit card fees of 46m British citizens must now be heard again by the Competition Appeal Tribunal (CAT). The case is the first mass consumer claim brought under the new collective action regime introduced in the Consumer Rights Act 2015.

## Upcoming In-House lawyer event

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### Brexit – Thriving in a new era

Wednesday 20<sup>th</sup> January 10:00 to 11:45

[Register Now](#)



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## Cases, laws, decisions referred to in this Bulletin

1	Joanne Properties Ltd v Moneything Capital Ltd [2020] EWCA Civ 1541
2	Data Protection Commissioner v Facebook Ireland and Maximillian Schrems, CJEU C-311/18
3	Heskett v Secretary of State for Justice [2020] EWCA Civ 1487
4	Merricks v MasterCard UKSC 2019/0118

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