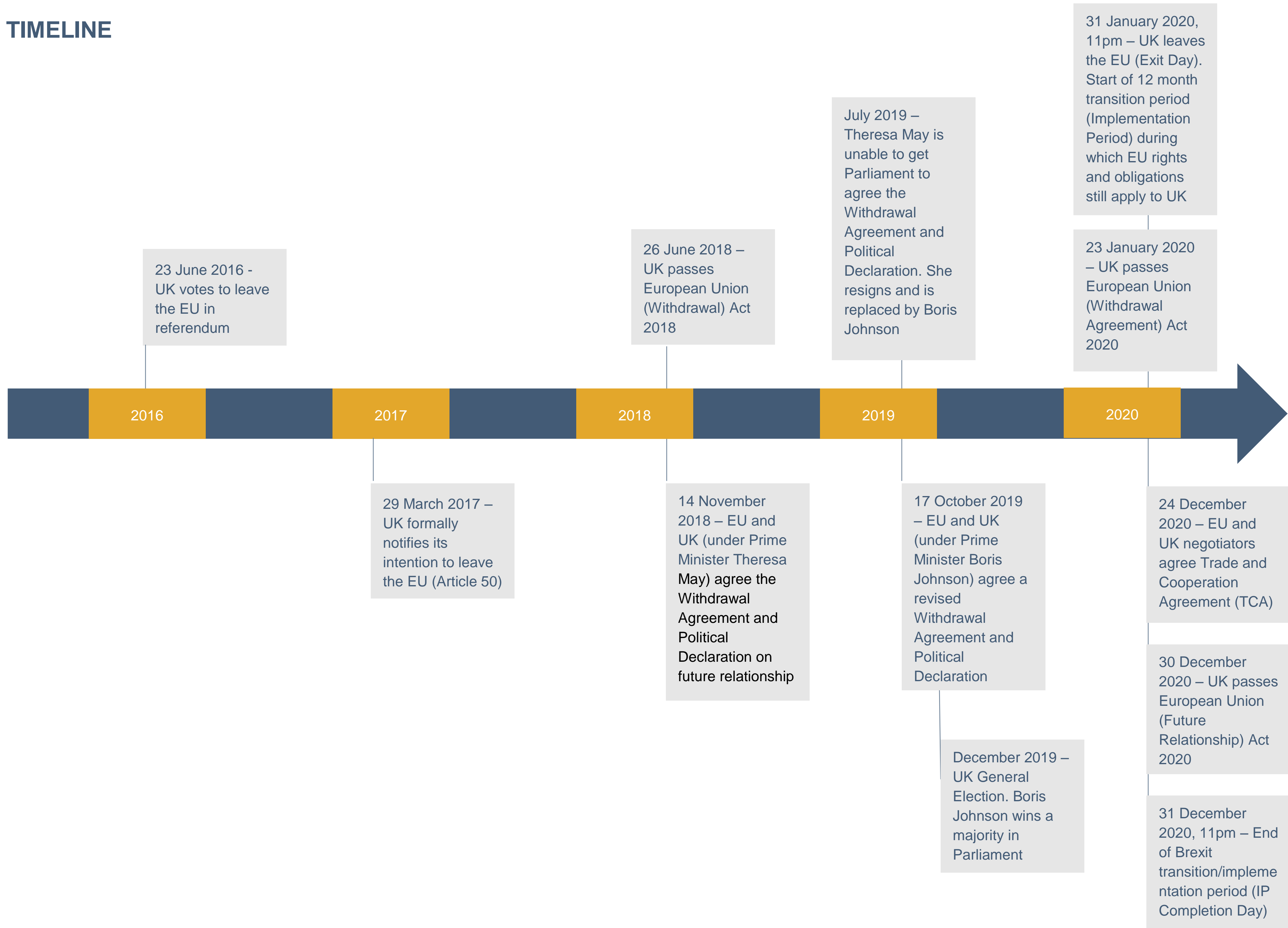
EMPLOYMENT BREXIT BRIEFING

January/February 2020

ADDLESHAW GODDARD

PRIVATE AND CONFIDENTIAL

TIMELINE



BREXIT-RELATED PRIMARY LEGISLATION

There have been several Acts to date, but the two most important for legal purposes are the European Union (Withdrawal) Act 2018 and the European Union (Withdrawal Agreement) Act 2020.

EUROPEAN UNION (WITHDRAWAL) ACT 2018 (EUWA)

The EUWA (as amended by the WAA) includes provisions that:

- Repealed the European Communities Act 1972 (ECA 1972) on 'exit day'. The ECA 1972 enabled EU law to become part of UK law, and gave effect to the principles of direct effect and the supremacy of EU law.
- On exit day, saved the effect of most of the ECA 1972 (in modified form), and saved and modified EU-derived domestic legislation for the duration of the transition period.
- Create a new body of retained EU law at the end of the transition period – this is a snapshot of the EU law that applied in the UK as at 31 December 2020, which becomes part of the UK's domestic legal framework going forward. This means that the UK can start to amend this body of law as it sees fit, so UK law may start to diverge from EU law.
- Confer various powers on the government to make secondary legislation, including the correcting power in section 8 to make regulations to deal with deficiencies in retained EU law arising from the UK's withdrawal from the EU.
- Provide for the general implementation, through automatic incorporation into UK law, of the UK-EU withdrawal agreement and the UK's agreements with Switzerland and the EEA EFTA states; and enable rights and obligations arising under the withdrawal agreement, and EU law applied to the UK by the withdrawal agreement, to have supremacy over any inconsistent UK law.
- Address the use of CJEU rulings by UK courts when interpreting retained EU law, subject to the terms of the withdrawal agreement (section 6).

EUROPEAN UNION (WITHDRAWAL AGREEMENT) ACT 2020 (WAA)

The WAA implements the following agreements into UK law, including through amendments to the EUWA:

- UK-EU withdrawal agreement, partly by express implementation, but also by regulations made under powers in the WAA and the amended EUWA.
- Separation agreement between the UK and the EEA EFTA states (Iceland, Liechtenstein and Norway), which sets out the arrangements for the UK's withdrawal from the EEA Agreement and from other EU agreements with the EEA EFTA states. The EEA EFTA separation agreement was signed on 28 January 2020, and relevant provisions were provisionally applied by the UK from exit day (although most of the agreement only applies from the end of the transition period). It enters fully into force in relation to the UK following ratification by the UK and at least one other party.
- Agreement between the UK and Switzerland on citizens' rights. This agreement was signed on 25 February 2019 and will take effect at the end of the transition period, when the EU-Swiss Free Movement of Persons Agreement stops applying to the UK.

WITHDRAWAL AGREEMENT

You may recall that Theresa May managed to negotiate a Withdrawal Agreement with the EU in November 2018 and got the Cabinet to back it, but then couldn't get the whole UK Parliament to approve it. She resigned and was replaced by Boris Johnson, who revised the Withdrawal Agreement with the EU in October 2019. He then called a general election in December 2019 and successfully gained a parliamentary majority, which then ratified the Withdrawal Agreement in January 2020.

For the text of the Withdrawal Agreement and Political Declaration see https://www.gov.uk/government/publications/new-withdrawal-agreement-and-political-declaration and for a summary see this Commons Library briefing. Basically it provided for a transition period (implementation period) from the date the UK left the EU (1 January 2020) until 1 January 2021, during which time the UK would continue to apply EU law but would be negotiating a new partnership arrangement with the EU to apply after the transition period ended.

And as you know, those negotiations went down to the wire and were only finalised on 24 December 2020.

EU-UK TRADE AND COOPERATION AGREEMENT (TCA) AND THE EUROPEAN UNION (FUTURE RELATIONSHIP) ACT 2020

On 24 December 2020, the UK Government and the European Commission announced a deal in principle on the legal terms of the future UK-EU relationship. A copy of the draft EU-UK Trade and Cooperation Agreement (**TCA**), was published, along with a number of associated declarations and agreements including a separate Nuclear Cooperation Agreement and an Agreement on Security Procedures for Exchanging and Protecting Classified Information (the **Agreements**).

For further information see UK Government Summary on the TCA.

The Agreements were then implemented in the UK by the urgent passing of primary legislation in the form of the European Union (Future Relationship) Bill 2020 which was introduced to Parliament on 30 December 2020. Having completed all its Parliamentary stages in a single day, the Bill received Royal Assent as the European Union (Future Relationship) Act 2020 (**the EU(FR)A 2020)**. Overall the EU(FR)A 2020 creates a framework through which the agreement can be implemented by regulations in due course, rather than implementing the agreement directly with immediate effect. Given the TCA is a complex 1200-page trade deal it is not unsurprising that this requires more than a single relatively short piece of primary legislation to implement it domestically. So lots more primary legislation to follow!

See also the Commons Library briefing note, The UK-EU Trade and Cooperation Agreement: summary and interpretation. This has a useful summary of the key points.

Key features of the TCA include the following:

- **Trade**: There will be no tariffs or quotas on trade in goods provided rules of origin are met. There are increased non-tariff barriers, but measures on customs and trade facilitation to ease these.
- **Governance**: The Agreement is overseen by a UK-EU Partnership Council supported by other committees. There are binding enforcement and dispute settlement mechanisms covering most of the economic partnership, involving an independent arbitration tribunal. There is no role for the Court of Justice of the EU in the governance and dispute settlement provisions.
- Both parties can engage in **cross-sector retaliation** in case of non-compliance with arbitration rulings (through suspension of obligations, including imposition of tariffs). This cross-sector retaliation applies across the economic partnership.
- **Level playing field provisions**: Both parties have the right to take counter-measures including imposition of tariffs, subject to arbitration, where they believe divergences are distorting trade. There is also a review mechanism where this occurs frequently.
- **Subsidies/state aid**: Both parties are required to have an effective system of subsidy control with independent oversight. Either party can impose remedial measures if a dispute is not resolved by consultation.
- **Fisheries**: 25% of the EU's fisheries quota in UK waters will be transferred to the UK over a period of five years. After this, there will be annual discussions on fisheries opportunities. Either party will be able to impose tariffs on fisheries where one side reduces or withdraws access to its waters without agreement. A party can suspend access to waters or other trade provisions where the other party is in breach of the fisheries provisions.
- **Security**: A new security partnership provides for data sharing and policing and judicial co-operation, but with reduced access to EU databases. A new surrender agreement takes the place of the European Arrest Warrant. Cooperation can be suspended by either side swiftly in the case of the UK or a Member State no longer adhering to the European Convention of Human Rights.
- **EU Programmes**: Continued UK participation in some EU programmes: Horizon Europe (Research), Euratom Research and Training, ITER fusion and Copernicus (satellite system).
- **Review and Termination**: The TCA will be reviewed every five years. It can be terminated by either side with 12 months' notice, and more swiftly on human rights and rule of law grounds.

Note that the Agreements were also signed by the EU on 30 December 2020 (EU Press Release: Signature of the EU-UK agreement) on the basis that they will be applied provisionally by the EU from 1 January 2021 as the European Parliament and the Council of the EU still need to examine them fully before formal ratification.

JOINT DECLARATIONS

Alongside the Agreements, the UK and the EU have agreed non-binding joint declarations in a number of areas (UK-EU Declarations). These include financial services, where the UK and the EU intend to establish structured regulatory co-operation, including agreeing a Memorandum of Understanding to establish the framework for co-operation by March 2021 and discussing

how to move forward with equivalence determinations. There are also declarations on subsidy control policies which cover transport projects (airports, roads and ports) and a declaration on Annex ENER-4 dealing with trading energy across interconnectors.

MORE INFORMATION ON TCA

In addition to the UK Government Summary on the TCA linked above and the Commons Library briefing on The UK-EU Trade and Cooperation Agreement: summary and interpretation, the following documents provide further information on the TCA:

- European Commission Overview: Consequences and benefits of the EU-UK Trade and Cooperation Agreement;
- European Commission Q&As: EU-UK Trade and Cooperation Agreement;
- European Commission Brochure: EU-UK Trade and Cooperation Agreement - a new relationship, with big changes;
- European Commission Infographic: From the UK referendum to a new Trade and Cooperation Agreement; and
- European Commission Timeline: From the UK referendum to a new Trade and Cooperation Agreement.

IMPACT ON DATA PROTECTION AND 'UK GDPR'

From IP completion day the EU GDPR will not apply to the UK. It will be saved in domestic law through section 3 of the EU(W)A 2018 and fall within the new category of law created by the EU(W)A 2018 known as 'retained EU law'. It will be renamed the 'UK GDPR'. The starting position is that data protection law in the UK will be the same as in the EU, subject to technical amendments to ensure the domestic operation of the retained regime.

The TCA contains provisions relating to data protection, although a data adequacy decision from the EU remains pending. In the short term, the most significant from a compliance perspective is the temporary ‘bridging mechanism’, which allows the free flow of data from the EEA to the UK to continue after the Brexit transition period ends at 11 pm on 31 December 2020, until adequacy decisions for the UK can be adopted under the EU GDPR and Law Enforcement Directive.

Note that the bridging mechanism can remain in place for up to six months. Although adequacy for the UK is not guaranteed, this is clearly the envisaged outcome. UK to EEA data flows can also continue as normal. The UK has already deemed the EU to be adequate on a transitional basis under the Data Protection Act 2018.

The bridging mechanism could cease to apply if the UK took steps such as conferring UK adequacy decisions on third countries or issuing UK standard contractual clauses without the consent of the EU through the Partnership Council, which supervises the operation of the TCA. The bridging mechanism will cease to have effect if the UK either (i) amends its data protection regime, or (ii) exercises powers which might cause a divergence between EU and UK data protection law without the consent of the EU within the Partnership Council. It is extremely unlikely that the UK would take steps which would invalidate the bridging mechanism. The UK can, however, make changes to its data protection framework during the period when the bridging mechanism is in place if these changes involve aligning UK law with EU data protection law. For example, if the EU brings in new standard contractual clauses, the UK may issue new clauses which mirror the EU clauses.

EMPLOYMENT ASPECTS OF THE TCA

NON-REGRESSION CLAUSE

The crucial provision of the TCA for employment law can be found in the "level playing field" provision in Chapter 6: Labour and social standards (under Title XI in Part 2). The level playing field has been one of the most contested areas of the negotiations. In short, the parties have agreed to a non-regression clause which prevents either party from reducing or weakening their own levels of protection at the end of the transition period "*in a manner affecting trade or investment between the Parties, its labour and social levels of protection below the levels in place at the end of the transition period, including by failing to effectively enforce its law and standards*". (Article 6.2(2)).

DISPUTE RESOLUTION

To show a breach of the non-regression clause, either party would have to demonstrate any attempt to lower labour standards affects trade or investment, which is a high bar for proof. Where there is a dispute over a breach of the non-regression clause, the parties are expected to first try and resolve the dispute through consultations and, if not successful, then through convening a panel of experts which can issue non-binding recommendations to both parties.(Article 9.1 and 9.2)

There is also the option to refer the matter to an arbitration tribunal and for either side to take remedial action if so authorised such as temporary tariffs. Which means that there is an option for either side to impose sanctions where there has been a breach of the non-regression clause.

REBALANCING

In the event that there is a divergence of the UK workers' rights with the EU protections, a rebalancing clause is included which allows either party to take action to rebalance the agreement where serious divergences in the areas of labour create material impacts on trade or investment. In practice this means that where the UK fails to keep pace on EU levels of employment protection and this affects trade or investment, the EU could take necessary and proportionate measures in response such as imposing tariffs (Article 9.4).

In reality, the chances of the rebalancing measures being used frequently is low because the criteria for using such measures are strict – the assessment of the impacts of the divergence must be based on reliable evidence and not on conjecture or remote possibility. Further, when one side intends to take rebalancing measures, the other side may request an arbitration tribunal to decide whether such measures are allowed before they are enacted.

IMPACT ON UK EMPLOYMENT LAW

There is a view that the deal as provided in the TCA is unlikely to prevent the UK government from weakening the EU-derived employment law if it so chooses. This could have a big impact on holiday and working time, for example. WTR 1998 being a direct implementation of the Working Time Directive, the government may wish to take a different view on some of the recent ECJ decisions.

At the moment, there is some consensus that the following aspects of holiday and working time which are viewed to be problematic from a business perspective may be changed in the future:

- Accrual of holiday during sick leave
- Calculation of holiday pay (all "normal pay" must be included in holiday pay which may be amended to just basic pay)
- Weekly working time limit of 48 hours a week

AREA BY AREA IMPLICATIONS

Area	Summary	Note
Agency workers	**Change** Changes to the AWR2010 made by the Posted Workers (Agency Workers) Regs 2010, SI 2020/384 expire on IP completion day subject to transitional provisions.	Rights under AWR 2010 are unlikely to change after IP completion day especially in light of the Taylor Review and the government's stated intentions in its Good Work Plan.
Collective redundancy consultation	No immediate change	Any future change unlikely.
Cross-border mergers	**Change** Companies (Cross-Border Mergers) Regs 2007 (SI2007/2974) and related regulations revoked to reflect that UK companies no longer have access to the regime designed for merger between companies in EEA member states.	The Companies, LLP and Partnership (Amendments etc) (EU Exit) Regs 2019 (SI2019/348) are now in force which revoke the Cross-Border Merger Regs 2007 and the related amending regulations entirely.
Discrimination and equal pay	No immediate change	EqA 2010 is domestic primary legislation so the Act remains as a whole even if parts of EU law were incorporated into it. Government unlikely to repeal EqA 2010.

Employer insolvency: UK employees working in an EU country for a UK employer	**Change** May still be protected by the national guarantee fund established in the EU country in which they work. But rights may differ in each country depending on how that country extends protections to non-EU employers and employees.	People living and working in the UK for a UK or EU employer will continue to be protected by the ERA 1996 which implements provisions of the Insolvency Directive (2008/94/EC).
Enforcement of employment contracts: applicable law, jurisdiction and procedural issues	**Change** Applicable law Rome I and Rome II continue to apply with modification Jurisdiction Brussels I (recast) and Lugano convention revoked from IP completion day. Amendments to CJJA 1982 to include specific provision for deciding jurisdiction issues in relation to employment contracts and to provide a mechanism for determining which part of the UK has jurisdiction. Service Amendments to CPR.	
European works councils (EWCs)	**Change** Not possible for a new request to set up EWC Earliest requests allowed to complete Current representatives can continue with employer's agreement	Upon IP completion day, those employed in the UK will not be able to ask their employer to set up an EWC. If a request to set up an EWC is submitted before 1 January 2021 it will be allowed to complete. UK businesses with an existing EWC and trade unions involved in EWC agreements may need to review those agreements from 1 January 2021. The government has stated it would "encourage businesses to continue to allow UK workers to be represented on EWCs on a voluntary basis".
Family-related leave and pay	No immediate change	Unlikely to change in future given that some of the rights preceded EU rights and are more generous than EU counterparts. Little political appetite for change.
Health and safety	No immediate change	
Holidays and working time	No immediate change except for retained EU regulations regarding drivers' hours and tachograph requirements amended	Refer to the note above
Social Security arrangements	**Change** EU co-ordination provisions apply to those who started to work in EU, EEA or Switzerland before IP completion day For UK citizens starting work in the EU, EEA or Switzerland after 1	

	January 201 and vice versa, the social security protocol in the TCA applies	
TUPE	No immediate change	Possible areas for change: • broadening scope for post-transfer contract variations • clarity on interpretation of transferred rights under collective agreements • liability for pre-transfer constructive dismissals where the employee objects to the transfer • application of TUPE in insolvency situations
The Charter of the Fundamental rights of the European Union	**Change** Charter removed from domestic law upon IP completion day.	• There is no change to ECHR which is often confused with the Charter. • No change to the HRA 1998. • UK's commitment to ECHR is reaffirmed in TCA.
Whistleblowing	No immediate change.	The UK is free to ignore any new EU directives. The Whistleblowing Directive was due to be implemented in December 2021. The UK may decide not to adopt this directive.

RETAINED EU LAW

EU(W)A 2018 (Withdrawal Act), s.6(7) defines retained retained EU law as '*… anything which, on or after IP completion day, continues to be, or forms part of, domestic law by virtue of section 2, 3, 4 or 6(3) & 6(6) of the European Union (Withdrawal) Act 2018 (as that body of law is added to or otherwise modified by or under this Act or by other domestic law from time to time)*'.

There are broadly 4 different types of retained EU law**,** one of which is *retained EU-derived domestic legislation* which is legislation made under the ECA 1972 s.2(2) (the ECA 1972 being the enabling legislation). Working Time Regulations (SI 1998/1833) (WTR) is an example of this retained EU law. s.2 of the Withdrawal Act 2018 defines and saves this legislation and carries it over to continue to apply after IP completion day.

The other types of retained EU law are:

- *Retained direct EU legislation* – this is EU legislation that is operative and has direct effect in the UK before IP completion day such as EU regulations, EU decisions and EU tertiary legislation. An example is the GDPR. S.3 of the Withdrawal Act 2018 converts this to domestic law. This is now known as UK GDPR.

- *Retained rights, powers, liabilities, obligations, restrictions, remedies and procedures* – these are recognised and available in domestic law through ECA 1972, s.2(1) before IP completion day. Examples include i) Article 18 of the Treaty on the Functioning of the European Union (TFEU) – non-discrimination on ground of nationality; and ii) Article 157 TFEU – the right to equal pay. s.4 Withdrawal Act 2018 converts these to domestic law.

- *Retained EU case law* – principles set out by and decisions of the CJEU relating to the above categories which have effect in EU law before IP completion day. This is dealt with in s.6 Withdrawal Act 2018.
    - The way the domestic courts interpret EU law will depend on whether it has been modified by UK law. Those not modified by UK law should be approached in accordance with relevant retained case law and principles, using a purposive approach where the meaning is unclear by considering the original purpose of the underlying EU law, compatibility with the EU treaties and general principles of EU law.
    - For those retained EU law which has been modified by UK law may also be approached in accordance with relevant retained case law and principles to the extent it is in line with the intention of the modifications.

INTERPRETATION OF RETAINED EU LAW POST-TRANSITION

BASIC PRINCIPLES OF INTERPRETING RETAINED EU LAW POST-TRANSITION

The Withdrawal Act is designed to provide continuity and legal certainty in UK law post-transition.

- Those CJEU principles and decisions that applied before the IP completion day continue to play a role in interpretation i.e. UK courts must continue to follow a defined body of retained UK and EU case law and retained general principles of EU law until a UK court departs from that body of case law and principles or until UK legislation modifies the relevant retained EU law.

- When interpreting retained EU law, UK courts must take an approach similar to that taken towards equivalent questions of EU law before the end of the transition period, including a purposive approach where meaning is unclear and using the aids to interpretation established by CJEU case law such as recitals.

- UK law passed or made before the end of transition must continue to be interpreted as far as possible and so far as relevant in accordance with EU law.

- Post-transition CJEU decisions are persuasive but not binding on the UK courts except where required by the withdrawal agreement.

HOW TO IDENTIFY THE RELEVANT INTERPRETATION REQUIREMENTS

1. First identify which law applies to your particular facts and circumstances i.e. is the situation governed by retained EU law, other UK law, EU law or the withdrawal agreement?

2. If the situation falls within the scope of the withdrawal agreement, then the withdrawal agreement takes priority over UK law:
    a. This means the UK law must be interpreted in accordance with the withdrawal agreement. The withdrawal agreement has its own requirements for the interpretation of EU law referred to in the withdrawal agreement, the interpretation of the withdrawal agreement in general, and the circumstances in which these provisions must be interpreted and applied in accordance with CJEU case law.

3. If it does not fall within the scope of the withdrawal agreement, but is within the scope of retained EU law then:
    a. apply the relevant Withdrawal Act provisions on the interpretation of retained EU law i.e. s.6(3) to s.6(6)
    b. continue to take a purposive approach where the meaning is unclear and use aids to interpretation established by CJEU case law such as recitals
    c. to the extent there is a conflict with the withdrawal agreement, the latter takes precedence

4. If the law that applies is not retained EU law, then the Withdrawal Act provisions do not apply to the interpretation.

RULES OF PRECEDENT AND DEPARTURE FROM CJEU DECISIONS

- s.6(4) of Withdrawal Act and regulations made under s.6(5A) allow UK courts to depart from retained EU case law. The only courts with the right to depart from retained UK case law are (where relevant):
    - Supreme Court, which applies the same test that it uses to decide whether to depart from its own case law i.e. "when it appears right to do so".
    - Court of Appeal in England and Wales
    - Court of Appeal in NI
    - Inner House of the Court of Session in Scotland

- The usual rules of precedent continue to operate between decisions of UK courts. For example, CA remains bound by the decisions of the SC, including post-transition decisions which modify or apply retained EU case law.

STATUS OF POST-TRANSITION CJEU DECISIONS

- UK courts are not bound by post-transition CJEU principles or decisions.

- UK courts cannot make post-transition references to the CJEU.

- UK courts "may have regard to" anything done post-transition by the CJEU, another EU entity or the EU "so far as it is relevant to any matter before the court".

FURTHER INFORMATION

See the AG Brexit Box which brings together all our Brexit materials.

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Asia, Europe, the Middle East and the UK

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