

Brexit and Debt Advice



Graham O'Malley outlines the implications of Brexit relating to debt advice.

The Expert Advice Team at Citizens Advice has been preparing for Brexit. It's been relatively calm for debt policy, but spare a thought for my immigration, benefits and housing colleagues. The trade deal itself contains little that will directly impact debt advice. This means that a raft of legislation entered force at 11pm on 31st December 2020, which largely ended mutual cooperation with the EU on issues like civil judicial cooperation and insolvency. The changes may be complex but reassuringly, will not impact most clients you help day-to-day. For cases that are affected, you'll probably need to signpost clients to legal advice, which isn't ideal and is likely to be costly.

This article looks at the legal changes brought about by Brexit but doesn't speculate on wider economic implications.

INSOLVENCY

Article 67 of the withdrawal agreement (WA)¹ meant the UK followed the EU Insolvency Regulation² during the transition or 'implementation' period. UK insolvencies (except DROs), trustees and insolvency practitioners continued to be recognised in the EU and vice versa.

From 1st January 2021 the Insolvency (Amendment) (EU Exit) Regs 2019³ retain the rules relating to 'centre of main interests' (COMI) in the EU Regs. This could allow EU

business to go insolvent in the UK if they have offices here for instance, but not much rides on this for most individuals. The test for clients is still whether they are habitually resident in the UK. If they've only moved here in the previous six months, there will be a closer inspection of the facts. This hasn't changed.

However, automatic recognition of each other's insolvency schemes ended on 31st December 2020. New insolvencies entered into after that date won't be automatically recognised in the EU. UK law can't determine how the EU will treat UK insolvencies entered before 1st January 2021, but the Insolvency Service's December 2020 'Dear IP' newsletter, suggests they will be recognised in the EU.⁴

Therefore, for new insolvencies, EU creditors might still try to enforce debts included in the procedure. We think so long as a client remains domiciled in the UK, any UK insolvency will still protect them from enforcement by EU creditors. This isn't confirmed and may be a case-by-case judgement. If a client returns to live in the EU, those EU creditors might take action to recover debts in the EU, despite debts being included in the client's insolvency.

An Official Receiver or Insolvency Practitioner (IP) will have to apply to the courts of EU countries to be 'recognised' in the EU. They are only likely to do so if it's worth it for the estate. Arguably, if an IVA is at risk of failing owing to EU creditor demands, an IP may agree to apply. However, it'll be at their discretion and they might consider

that the debt is unenforceable whilst the client is in the UK. An Official Receiver is only likely to apply where there are assets in the EU that will cover their costs and return money to creditors. Recognition in the EU state will depend on the domestic law of that country so legal advice will be needed. The Insolvency Service has written a nation by nation guide.⁵

EU ADMINISTERED PENSIONS IN BANKRUPTCY

UK administered pensions are almost all excluded as an asset from the bankruptcy estate, as they are 'approved' by HMRC. The position in the technical manual is that pensions administered in an EU state will be excluded from the bankruptcy estate as a matter of policy but not law (para 57.39).⁶ However, the policy may well be withdrawn as it was written to recognise equal treatment of EU citizens and freedom to move and

1. www.gov.uk/government/publications/withdrawal-agreement-and-political-declaration
2. <https://eur-lex.europa.eu/legal-content/en/TXT/?uri=CELEX%3A32015R0848>
3. www.legislation.gov.uk/ukxi/2019/146/contents/made
4. https://content.govdelivery.com/attachments/UKIS/2020/12/18/file_attachments/1630310/Dear%20IP%20Issue%20116.pdf
5. www.gov.uk/government/publications/cross-border-insolvencies-recognition-and-enforcement-in-eu-member-states-from-1-january-2021/cross-border-insolvencies-recognition-and-enforcement-in-eu-member-states-from-1-january-2021
6. www.whatdotheyknow.com/request/657747/response/1565422/attach/html/46/57.Pensions.pdf.html

set up an establishment. Legal advice will be needed in relevant cases. As an aside, the technical manual is not updated online (and is well out of date). The maintained version used for this article can only be accessed by a freedom of information request at the moment. Unfortunately, the only way to ensure you're reading the up to date manual is to make a freedom of information request at the relevant time.

If you're interested in the policy surrounding this issue, see the 'McNamara' case in the High Court, now referred to the Court of Justice of the EU.⁷

EU-BASED CREDITORS

Articles 67-69 of the WA⁸ preserved cross-border debt enforcement throughout the transition period. This meant that the UK automatically recognised EU judgments, European Enforcement Orders (EEOs), European Small Claims (ESCs) and European Orders for Payments (EOPs) for enforcement in the High Court, as was the case before Brexit.

From 1st January 2021, mutual recognition and enforcement of judgments drops away. The UK will recognise any judgment registration, EEO, ESC and EOP applications made before 1st January 2021, but will not automatically recognise new actions.^{9,10} EU creditors will have to start new claims in the UK and be awarded judgment (or not) on a case-by-case basis. This makes it harder for EU creditors to enforce debts in the UK, but also makes it tougher for UK based consumers to enforce judgments against EU-based companies.

There are options open to the UK. The government could sign up to the Lugano Convention.¹¹ This mirrors some of the EU reciprocity under the EU regs we've just left but it would take some months to ratify. There is also a Hague Convention on the Recognition and

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Enforcement of Foreign Judgments in Civil and Commercial Matters.¹² This is even closer to the EU Regs, but neither the UK or EU have signed to date.

The UK has signed the Hague Convention on Choice of Courts Agreements to come into force from January 2021.¹³ This means that the UK will respect any "exclusive choice of court agreement" in contracts that state in which country legal action must be taken. However, the convention does not apply to individual consumers. There is a difference of opinion over when the convention applies to the UK. The UK joined the convention on 1st October 2015 as an EU member, so argues the convention should apply to relevant agreements entered after this date. The EU sees the UK's re-entry on 1st January 2021 as the effective date, with agreements before that date not covered. This might only be resolved by case law.

There is mutual recognition and enforcement with Norway, and potentially with certain states, through old and new law as follows:

- Norway, through the Reciprocal Enforcement of Foreign Judgments (Norway) (Amendment) Order 2020 – Norway is non-EU, but is in the European Free Trade Association.
- Austria, Belgium, France, Germany, Italy and the Netherlands, by way of orders made under the Foreign Judgment (Reciprocal Enforcement) Act 1933.
- Cyprus – by way of an order made under the Administration of Justice Act 1920.

It's also unclear whether the old

SIs will simply revive or not as they were superseded by EU law, so in relevant cases, legal advice will be needed.

All the above said, the UK has preserved an important part of EU law for individual consumer contracts; a consumer has a right to be sued, and to sue in the state in which they live.¹⁴ If someone remains in the UK, as a consumer at least, they should be sued here. One notable exception is action relating to property (ie a house). In that case, a creditor can start action where the property is based. There are different rules for employment-related claims so you would need to refer for employment advice. The full text of the law can be found in reg 26 of The Civil Jurisdiction and Judgments (Amendments) (EU Exit) Regs 2019.

Section 2 of the Private International Law (Implementation of Agreements) Act 2020,¹⁵ allows the government to adopt other conventions on civil jurisdiction in future, within five years from 14th December 2020. This period can be extended, so we may see new civil jurisdiction conventions adopted in due course.

FCA REGULATION OF EEA FIRMS

Before 31st December 2020, firms within the EEA (so the EU plus

7. tinyurl.com/y58nksrl

8. Arts 67 - 69 cover civil jurisdiction including insolvency and other judgments/enforcement

9. www.legislation.gov.uk/uksi/2018/1311/contents/made

10. www.legislation.gov.uk/ukdsi/2019/978011176726/contents

11. <https://eur-lex.europa.eu/legal-content/EN/L/?uri=CELEX%3A22007A1221%2803%29>

12. www.hcch.net/en/instruments/conventions/full-text/?cid=137

13. www.legislation.gov.uk/ukpga/2020/24/section/1/enacted

14. www.legislation.gov.uk/uksi/2019/479/regulation/26/made

15. www.legislation.gov.uk/ukpga/2020/24/section/2/enacted

The eligibility criteria to open a basic account from a UK provider now requires a person to be *legally resident in the UK* as opposed to *legally resident in the EU*.

Norway, Iceland, Liechtenstein, and Switzerland) could 'passport' into the UK to provide services.¹⁶ This meant the FCA didn't have to authorise them separately if the firm was authorised by their home regulator. It applied to EEA banks, lenders, debt collectors... any regulated activity that the FCA would normally authorise. This passporting regime ended on the 31st December 2020.

EEA firms offering services in the UK from January 2021, will be in one of three categories:

1. **The temporary permissions regime (TPR)** – Firms had to register by the 30th December 2020 by notifying the FCA. Within three years, each registered firm must apply for FCA authorisation. During this period, and in the event the firm becomes fully authorised, consumer protections such as the FCA rules, the Financial Ombudsman Service (FOS) and where applicable, the Financial Services Compensation Scheme (FSCS) still apply.
2. **Supervised run off (SRO)** – this is one leg of what the FCA calls the 'Financial Services Contracts Regime'.¹⁷ SRO allows EEA firms with UK branches who do not plan to continue to trade here to wind down their services within five years. Firms who enter the TPR but fail to get authorised also enter this process. This might mean using this time for collecting in debt, selling debt and selling accounts for instance. During the SRO period, the firm will not be able to take on new business, but FOS, FSCS, and FCA rules will continue to apply.

3. **Contract run off (CRO)** – this is the second leg of the Financial Services Contracts Regime, where a firm has no UK branch. CRO firms will not be supervised by the FCA, or have to follow their conduct rules. FOS, FSCS (in most cases) and FCA principles will not apply. This is also a five-year period to wind down or sell on a business but with less consumer protection.

The FCA has published an online guide.¹⁸ There will be little immediate interruption to services for clients in the UK.

BASIC BANK ACCOUNT ACCESS

Our domestic Payment Account Regulation 2015 changed on 1st January 2021. The eligibility criteria to open a basic account from a UK provider now requires a person to be *legally resident in the UK* as opposed to *legally resident in the EU*.

This is wider than Brexit and applies to any person in the UK, not just EU nationals. However, given the changes to immigration law due to Brexit, some EU/EEA and Swiss nationals might not be legally resident in the UK from 1st January 2021. You should help clients get immigration advice, but remember:

- Anybody with settled or pre-settled status under the EU Settlement Scheme (EUSS), is legally resident.
- EU/EEA and Swiss nationals who were in the UK before 31st December 2020 at 11pm, have until 30th June 2021 to apply to the EUSS. They are also legally resident in the meantime. However, these clients will not be legally resident after 30th June 2021 if they fail to apply to the EUSS.
- Family members of the above two groups will also be legally resident, even if they started to live in the UK after 31st December 2020, provided they

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have been given permission to enter.

- Otherwise, EU/EEA/Swiss nationals who started to live in the UK after the 31st December 2020 will be coming to the UK under new rules. However, they will only be able to enter the UK if they obtained the relevant permission before they set off, so it is likely that anyone who entered the UK after this date will be here legally.

Find out more about the EU settlement scheme on Citizens Advice's website.¹⁹

CHILD MAINTENANCE, TAX AND MAGISTRATES' COURT ENFORCEMENT

For maintenance, the UK and EU had a reciprocal enforcement arrangement²⁰ but this ended on 31st December 2020. However, the UK is in the Reciprocal Enforcement of Maintenance Orders (REMO) scheme. Instead of relying on EU law, the UK will rely on REMO, and the EU is also a signatory. This means that child maintenance payments can still be recovered from UK nationals in the EU, and vice versa.

Under the withdrawal agreement, the UK government has kept the reciprocal tax enforcement arrangements in UK law for five years (art 100)²¹ from the agreement

16. www.fca.org.uk/firms/passporting

17. www.fca.org.uk/news/statements/financial-services-contracts-regime

18. www.fca.org.uk/consumers/how-brexit-could-affect-you#revisions

19. www.citizensadvice.org.uk/immigration/staying-in-the-uk-after-brexit/staying-in-the-uk-if-youre-from-the-eu/

20. <https://eur-lex.europa.eu/legal-content/EN/ALL/?uri=CELEX%3A32009R0004>

21. www.gov.uk/government/publications/withdrawal-agreement-and-political-declaration

being implemented. The European Union (Withdrawal Agreement) Act 2020 commenced on 23rd January 2020, so for five years from that date, HMRC will enforce EU tax debt. It appears the EU will reciprocate as suggested by the EU's draft agreement in March 2018 (art 95).²² However, this is not yet confirmed. The trade deal added nothing in terms of recovery of personal taxes such as self-assessment and therefore these can no longer be pursued by EU states on behalf of HMRC, and vice versa. There is a new protocol on mutual assistance for VAT recovery, outside of the scope of this article.²³ Advisers should refer relevant clients to Business Debtline.²⁴

The FCA regulation of buy-to-let mortgages will be limited to agreements secured on property in the UK, and not property across the EEA.

After 31st December 2020 EU criminal fines are no longer automatically enforced in the UK. Part 5 of The Criminal Justice (Amendment etc) (EU Exit) Regs 2019 removed mutual enforcement, other than for fines enforcement requests already made by EU member states before 31st December 2020.²⁵ The trade deal revives the 1959 European Convention on Mutual Assistance in Criminal Matters (amended in 1978 and 2001). Under these revived rules, UK and EU states will provide assistance with serving fines related documents across borders, but not with direct enforcement.

CONSUMER CREDIT AND MORTGAGE CREDIT

The pre-contract document provided before a loan is entered, called the Standard European

Consumer Credit Information Form (SECCI), will not be called that anymore. However, the contents will not change.²⁶

The FCA regulation of buy-to-let mortgages will be limited to agreements secured on property in the UK, and not property across the EEA. The FCA will regulate pre-existing loans secured on property in the EEA though.²⁷

WE'LL KEEP YOU POSTED

The Brexit project at Citizens Advice has taught us how fluid changes can be. Debt policy has remained pretty stable throughout the withdrawal process, and the only change we expect is entry into a convention on civil jurisdiction (probably the Lugano Convention). It's always appeared the case that much of the reciprocal EU law in our area was likely to end on 31st December 2020, but Brexit could be unpredictable. Hopefully, it's reassuring to say that if you've not been tracking the potential changes, then you haven't missed a great deal. You've had bigger fish to fry.

We'll let you know on Adviser Online²⁸ and our website if there are any developments. We also cover immigration, housing,

employment, consumer, family and benefits changes. If you haven't yet done so, all advisers should become familiar with the basics of the EU settlement scheme. You'll still be seeing clients who need help to understand the rules.²⁹

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22. https://ec.europa.eu/commission/sites/beta-political/files/negotiation-agreements-atom-energy-15mar_en.pdf
23. https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/948119/EU-UK_Trade_and_Cooperation_Agreement_24.12.2020.pdf
24. www.businessdebtline.org/
25. www.legislation.gov.uk/ukdsi/2019/978011180860/pdfs/ukdsiem_978011180860_en.pdf
26. www.legislation.gov.uk/ukxi/2018/1038/regulation/3/made
27. www.legislation.gov.uk/ukdsi/2019/978011177532/pdfs/ukdsiem_978011177532_en.pdf
28. <https://medium.com/adviser>
29. <https://www.citizensadvice.org.uk/immigration/staying-in-the-uk-after-brexit/staying-in-the-uk-after-brexit/>

