

# Stark warning or smart positioning?

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The EU Commission publishes additional “No-Deal” Brexit guidance on civil justice cooperation

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On January 18, 2019, the EU Commission published a notice on the impact of a No-Deal Brexit on the rules of civil justice and private international law. This guidance replaced the EU Commission's previous notice dated November 21, 2017. The EU's update followed the UK Law Society's October 2018 publication on the effect of a No-Deal Brexit on civil and commercial cooperation. With concerns on contractual continuity mounting the EU's position on how it will recognize and apply its rules to the UK matters for a wide range of relationships across markets.

This Client Alert provides an overview of the key points in the EU Commission's update and highlights some of the potential repercussions of the UK becoming a “third country” from March 30, 2019 at midnight Central European Time (the Exit Date) as well as departure on a No-Deal basis. The Commission's notice is clear in its warning that “preparing for the withdrawal is not just a matter for EU and national authorities but also for private parties.” That warning is echoed by an even stronger one (and emphasized in a standout box in bold) stating, in relation to recognition of judgments: “All stakeholders are advised to take this into consideration when assessing contractual choices of international jurisdiction.” The Commission's No-Deal updated notice applies to all disputes i.e. from financial markets to real-economy disputes and beyond.

## No-Deal Brexit at a glance

Broadly speaking, if there is no EU-UK Withdrawal Agreement or agreement regulating future relations in place by the Exit Date, the UK will withdraw from most reciprocal EU agreements without a negotiated transition period. These reciprocal agreements currently harmonize many civil and commercial matters between individuals and companies domiciled in the EU (and occasionally EEA/EFTA) Member States. Generally, the national laws of the UK and EU/EEA/EFTA Member States will automatically regulate areas no longer governed by EU law.

In practical terms, the prospect of a No Deal Brexit means that the EU's rules relating to civil justice and private international law will, from the EU's perspective, cease to apply to the UK.

As a result, the current regime regulating how proceedings, which are either pending and/or initiated on the Exit Date, as well as those that arise after the Exit Date, will change drastically.

This applies both to a stop in automatic mutual recognition and enforcement of civil judgments as well as those which are subject to *exequatur* i.e., the process whereby a legal document is granted by a sovereign authority permitting the exercise or enforcement of a (foreign) right within the jurisdiction of that authority – such as notarized certifications and/or notarization.

## So, what specifically changes in the current regime across the EU?

Important regulations likely affected by a No-Deal Brexit include the Brussels I Regulation, the Lugano Convention, the Insolvency Regulation, the Hague Conventions and the Rome Regulations, among others.

The Brussels I Regulation allows for automatic mutual recognition and enforcement of civil and commercial judgments between EU Member States and regulates the jurisdiction of their courts. As a general rule, it assigns jurisdiction to the courts of the defendant's member state.

As the system inherently relies on reciprocity, a No-Deal Brexit would result in the UK no longer automatically recognizing EU27 judgments, and UK judgments no longer being automatically recognized in EU27 countries.

The Lugano Convention operates in close connection with the Brussels I Regulation and provides for the enforcement of judgments between the EU/EFTA States and Switzerland. If the UK leaves without an agreement in place, the Lugano Convention will no longer apply. The UK Government announced its intention to re-join the Lugano Convention post-Brexit, but this process requires EU and EFTA ratification, which is not guaranteed.

The EU Regulation on Insolvency Proceedings allows UK insolvency proceedings to be recognized in EU27 states and vice versa, and generally applies the parties' choice of governing law rather than local insolvency law. This regulation will cease to apply following a No-Deal Brexit, and insolvency officeholders (or officials with analogous rights) in the UK may have trouble enforcing claims in EU27 states.

The Hague Conventions will likely continue to apply in the event of a No-Deal Brexit. The UK Government has announced its intention to accede to the 2005 Hague Convention on April 1, 2019. This will allow for recognition and enforcement where there is an exclusive choice-of-court agreement between parties. However, the Hague Convention only applies to parties who conclude an exclusive choice-of-court agreement after the Convention entered into force. Therefore, it will only apply to agreements entered into on or after October 1, 2015, or, if the UK is required to re-join the Hague Convention, those from 2019. Other Hague Conventions, such as the Hague Service Convention and Hague Evidence Convention will also continue to apply upon a No-Deal Brexit. These regulations govern the taking of evidence, as well as the cross-border service of documents, and are able to regulate most matters currently falling within the scope of the EU's Service and Evidence Regulations, which would cease to apply in the event of a No-Deal departure.

The Rome I and II Regulations, which regulate what law is applicable in both contractual and non-contractual matters, will continue to operate upon a No-Deal Brexit.

## The No-Deal regime

Where the aforementioned regulations cease to apply, the UK and EU (as well as EEA/EFTA) states are likely to either fall back on previously signed treaties or revert to their respective national law.

Multi- and bilateral treaties that may be of relevance include a range of pre-Brussels I Regulation treaties between the UK and various EU/EEA states, such as the Brussels Convention of 1968. The Court of Justice of the EU (the ECJ) may, however, review these treaties' continued applicability in the UK, as the Brussels I Regulation has superseded several older conventions, and the Brussels Convention of 1968 is an EU convention that may not be suitable for third-party use. Therefore, the applicability of pre-Brussels I Regulations is currently far from certain.

The national laws of the UK and EU Member States will likely govern the enforcement of cross-border judgments following a No-Deal Brexit (in the absence of applicable statute). Under principles of Common Law, a judgment will not be directly enforceable but instead creates a type of debt between parties which the creditor must enforce. The requirements are fairly straightforward: the issuing court must have had jurisdiction according to UK law, the judgment must be final and must not be against UK public policy, etc. Reciprocity of recognition is not a relevant factor. The courts to which the application must be made are the High Court (Queen's Bench) in England and Wales, the Court of Session in Scotland and the High Court in Northern Ireland. Whether EU27 states would continue to recognize and enforce judgments originating in the UK depends on the national laws in place and therefore varies between countries.

## What a No-Deal Brexit means for pending cases according to the EU Commission's notice

The vast majority of EU-based cases involving a UK-domiciled defendant will continue to apply EU Rules to proceedings pending on the Exit Date. Proceedings initiated on or after the Exit Date will be governed by the national laws of the member state in which the court is "seized" i.e., which court will have jurisdiction over the dispute. This is generally the first court to receive the claim. Parties often have a commercial and/or tactical preference to have a chosen court in one's "own" jurisdiction be seized over that of a "foreign" court in a foreign jurisdiction.

Under EU law, there is a general position that the defendant must be sued in his own country unless there is an exclusive jurisdiction clause, there is a particular nexus to a specific jurisdiction in terms of place of performance and/or occurrence of a breach. As a result, the Commission's clarifications on its approach may raise tactical and strategic questions for disputing parties.

The recognition and enforcement of UK cases in an EU member state will be possible where a judgment has been exequatored prior to March 29, 2019. Proceedings pending on the date of withdrawal will not be enforced if they have not been exequatored, even where judgment has been given and enforcement proceedings have been commenced. EU rules will not apply to proceedings initiated on or after the Exit Date. 'Judgments' in this context also include decisions made under the European Payment Order Procedure or the European Procedure for Small Claims. Moreover, the Commission's updated advice also states that the EU provisions that abolish apostilles and replace them with simplified measures, pursuant to Regulation (EU) 2016/1191, in relation to certain public documents (such as a birth certificate) will cease to apply to public documents issued by UK authorities in EU27 member states. That may affect more than just financial services staff who may be relocating, but also a range of "life situations" for UK, EU/EEA and nationals of other jurisdictions resident on either side of the "Brexit Border."

The recognition and enforcement of EU and EEA cases in the UK will still be possible where proceedings have been initiated prior to the Exit Date.

The Commission's updated advice is also clear (again using a bold text and standout box) that on the Exit Date, EU27 Member States will not be able to use EU law to continue or implement new EU-UK judicial cooperation arrangements and thus "All national Central Authorities are advised to assess whether judicial cooperation procedures risk being pending on the withdrawal date and whether the procedure can continue under national law or a relevant international convention. Where this continuation under national law or a relevant international convention is possible, the Central Authority should consider submitting an additional request under the relevant national law/international convention which would be conditional upon the United Kingdom withdrawing from the Union without withdrawal agreement."

## Looking ahead

As the outcome of Brexit negotiations is heading towards a "Messy-Brexit" irrespective of whether a suitably binding deal is done and No-Deal is firmly taken off the table, the UK will still become a third-country on the Exit Date. When making contingency plans, it is crucial to anticipate what actions the UK may take, but even more vital to understand how EU27 Member States will treat English court judgments and commercial ties more generally.

Dentons has 28 offices across the UK and continental Europe and an unparalleled breadth and depth of knowledge regarding jurisdictions where your business may be affected: <https://www.dentons.com/en/global-presence/europe>. along with our dedicated Brexit Working Group as well as our **Eurozone Hub** to assist financial services firms with how Brexit may affect them specifically.

## Links to referred sources

The EU Commission's notice is available at: [https://ec.europa.eu/info/sites/info/files/notice\\_to\\_stakeholders\\_brexit\\_civil\\_justice\\_rev1\\_final.pdf](https://ec.europa.eu/info/sites/info/files/notice_to_stakeholders_brexit_civil_justice_rev1_final.pdf)

The Law Society's guidance is available at: <https://www.lawsociety.org.uk/support-services/advice/articles/no-deal-brexit-guidance-civil-commercial-cooperation/>

Regulation (EU) 2016/1191 of the European Parliament and Council (promoting the free movement of citizens by simplifying public document requirements) is available at: <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A32016R1191>

Should you wish to continue the conversation on the subjects raised herein, please do get in touch with the key contacts on the next page.

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