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Brexit and Guernsey: What you need to know

DECEMBER 2020

The UK formally ceased to be a member of the EU on 31 January 2020. Following this, the terms of a withdrawal agreement between the UK and the EU (the **Withdrawal Agreement**) provided for a transition period, which ends on 31 December 2020, allowing time for the UK and EU to attempt to formalise the terms of their ongoing future relationship.

During the transition period, the relationship between the UK and the EU (and consequently, the relationship between the EU and Guernsey) has been largely unaltered. As a result, it is at the end of the transition period that, in many people's eyes, true "Brexit" will occur. For the purposes of this article, "Brexit" refers to the end of this transition period.

At the time of writing this article, it is still unclear exactly what the future relationship between the UK and the EU will be, i.e. whether there will be a comprehensive free trade agreement in place from 1 January 2020 or whether the trading relationship will be (at least initially) on World Trade Organisation terms, i.e. a so-called "no deal" Brexit. Whatever eventuality, businesses in Guernsey and elsewhere must still consider how they may be affected by Brexit and be ready for all eventualities.

As we have stated in previous guides, since the referendum in 2016, Guernsey's government and law makers have been taking steps to ensure that there is continuity and certainty during the Brexit process for both individuals and businesses in Guernsey. Despite ongoing uncertainty, Guernsey has been working towards putting in place all required legislative and other measures as quickly as possible, together with guidance for businesses, to take account of the likely impact of Brexit on Guernsey, irrespective of whether there is a "deal" or "no deal".

Whilst the States of Guernsey's stated objectives in its Brexit preparations include mitigating any adverse impacts of Brexit (notably on trade in goods and services and on immigration) and pursuing any opportunities that are created as a result of Brexit, it is important that businesses in Guernsey continue to understand the changes and measures being adopted and how they may be affected, not least to enable them to explore the potential opportunities that Brexit may bring.

This Guide covers a range of matters which may be relevant to Guernsey businesses.

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1. I thought Guernsey was outside the EU. Why are we bothered by Brexit?

The Bailiwick of Guernsey (which comprises the islands of Guernsey, Alderney, Sark and Herm), along with the other Crown Dependencies, the Bailiwick of Jersey and the Isle of Man, are not member states (or associate members) of the EU and are not part of the UK. Guernsey has its own government which is elected locally, makes its own laws (including in respect of taxation) and has its own court system.

However, Brexit will almost certainly affect most businesses which operate in Guernsey, and individuals who live and work here, in one way or another. There are several reasons for this:

Guernsey's relationship with the UK

Guernsey is a Crown Dependency and as such it has a special constitutional relationship with the British Crown which is underpinned by historic Royal Charters dating back to the 14th century. Such a significant event for the UK as Brexit is bound to have some impact on Guernsey.

Of particular note is Guernsey's relationship with the City of London. The growth and success that Guernsey has experienced in the financial services sector has tracked the success of London as an international finance centre. Any adverse affect on financial services businesses in London caused by Brexit will likely have an impact on financial services businesses in Guernsey.

Guernsey's relationship with the EU

Guernsey is currently part of the EU Customs Union by virtue of Protocol 3, which also provides (with limited exceptions) for the free movement of persons between Guernsey and the EU. This will no longer be the case

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after Brexit.

Commercial relationships

Many businesses in Guernsey have commercial ties with the UK and/or the EU, whether as part of the same corporate group as businesses in the UK or the EU, as suppliers to or customers of UK or EU businesses, as owners of assets in the UK or the EU or as employers of EU citizens. To varying degrees, Brexit will affect those relationships.

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2. Protocol 3 – what is that? What will happen to Protocol 3 after Brexit?

Its full name is Protocol 3 of the Treaty of Accession of the United Kingdom to the EEC, which was signed on 22 January 1972.

When the UK joined the EU (the European Economic Community (EEC) as it was then) in 1973, it was agreed that Guernsey would benefit from the UK's membership of the EU by bringing it, along with the other Crown Dependencies, within the EU Customs Union for the purposes of trade in certain goods (but not services), whilst preserving its autonomy. This agreement was set out in Protocol 3.

Broadly speaking, the effects of Protocol 3 are that no customs duties are applied to goods exported from Guernsey to members of the Customs Union but a common customs tariff applies to goods imported into the Customs Union from non-member countries. In addition, EU rules which provide for the free movement of agricultural products apply in Guernsey, subject to any conditions imposed by the EU.

Under Protocol 3 Guernsey is "within" the EU for most of the purposes of the free movement of goods but outside the EU for other purposes, in particular non-customs related fiscal matters and the free movement of persons and services.

Protocol 3 also preserves the rights of Channel Islanders in the UK but provides that Channel Islanders with no direct connection to the UK (through birth, descent from a parent or grandparent or 5 years' continuous residence in the UK) shall not benefit from EU provisions relating to free movement of persons and services. It also requires equal treatment by the islands' authorities of all EU citizens.

Protocol 3 technically ceased to have any effect once Brexit occurs, irrespective of whether a deal is agreed – the Protocol 3 relationship is dependent on the UK remaining a member of the EU but it was agreed under the Withdrawal Agreement that it would continue to apply. However, on 31 December 2020, at the end of the transition period, it will cease to apply, simultaneously with all other arrangements between the UK and the EU.

Guernsey has enacted legislation, The European (Brexit) (Bailiwick of Guernsey) Law, 2018) (the **Brexit Law**) to repeal the domestic legislation enacted to implement the arrangements set out in Protocol 3 (The European Communities (Bailiwick of Guernsey) Law, 1973 (as amended)) with effect from exit day (which was

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subsequently modified to reflect the end of the transition period), regardless whether the UK secures a Brexit deal.

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3. EU laws are not effective in Guernsey anyway, right?

Yes and no. In short, EU laws are not applicable in Guernsey except in a limited number of cases under Protocol 3.

Briefly, there are two principal types of European legislation which are relevant in this context: Regulations and Directives. Regulations are directly applicable in EU member states whereas Directives are binding on member states "as to the result to be achieved" but it is for national authorities to decide the form and methods of implementing them.

EU laws which are effective in Guernsey

Through Protocol 3 certain Regulations relating to trade in goods (predominantly agriculture and fisheries) are directly applicable in Guernsey. They have immediate legal effect and form part of Guernsey law without the need to enact local legislation (pursuant to the European Communities (Bailiwick of Guernsey) Law 1973) (as amended) (EC Law)).

Guernsey has taken steps to retain control over European legislation which is directly applicable in Guernsey by enacting the Brexit Law which, from exit day (i.e. 31 January 2020):

- repealed the EC Law and turned off the flow of European legislation which was directly applicable in Guernsey pursuant to Protocol 3 from exit day;
- preserves in domestic law any directly applicable EU legislation which had effect in Guernsey immediately before exit day (**Preserved EU Law**);
- provides a mechanism to amend and repeal Preserved EU Law where necessary and expedient in consequence of Brexit; and
- makes provision for the interpretation and status of EU law in Guernsey after exit day.

Certain modifications were made to the Brexit Law under The European Union (Withdrawal Agreement) (Brexit) (Bailiwick of Guernsey) Regulations, 2020 in order to implement the terms of the Withdrawal Agreement, which as mentioned above, largely kept in place the provisions of Protocol 3.

Other EU laws

Where Directives may be applicable under Protocol 3, they can be implemented locally by Ordinance under the European Communities (Implementation) (Bailiwick of Guernsey) Law, 1994 (as amended) (Implementation Law). At that point, they become domestic law and have legal force in Guernsey by virtue of being Guernsey law, rather than European law.

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Guernsey can also voluntarily implement any provision of EU law under the 1994 Law, whether or not it falls within Protocol 3, which it has done in a number of areas, including financial services, anti-money laundering, EU sanctions and data protection. Guernsey has also adopted (by enacting domestic legislation) some aspects of EU legislation in compliance with bilateral agreements in place between Guernsey and member states of the EU, for example agreements relating to the exchange of tax information.

Such domestic legislation will continue in force in Guernsey and is unlikely to be significantly affected by Brexit, although some minor amendments may be required to take into account the practical effect of the UK no longer being part of the EU.

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4. Without Protocol 3 how will Guernsey trade with the EU?

Goods

Remember that Protocol 3 only provides for the trade in goods (not services) between Guernsey and the EU. The export of goods to the EU today represents a relatively small part of Guernsey's economy, whereas when it was introduced in the 1970's Guernsey's main industry was horticulture – tomatoes, and later flowers, were grown locally for export to the UK and the rest of Europe (and most of the raw material in the industry, such as the flower bulbs, were imported from Europe).

In any event, most of the goods exported from Guernsey go to the UK, underpinned by rights set out in the historic Royal Charters mentioned above, rather than Protocol 3. The end of Protocol 3 should not have a significant impact on trade.

That said, Guernsey has taken steps to protect trade (in both goods and services) between the UK, the EU and the rest of the world – see next question.

Services

Guernsey is also a significant exporter of services to the EU, the UK and globally in certain industry sectors, particularly financial services. Guernsey is home to a large number of banks, trust companies, fund administrators, fund managers and other financial institutions that provide services to individuals and businesses in the EU, so it is vital for Guernsey's economy that the export of services to the EU (and the UK) is not affected by Brexit.

Guernsey is able to market financial services to the EU because those services currently meet the requirements imposed by the EU (which will not change because of Brexit). As noted above, services have always been outside the scope of Protocol 3. Therefore the repeal of Protocol 3 following Brexit will have no direct effect on the export of these services to the EU.

Guernsey has also taken steps to ensure continued market access for Guernsey investment funds into the UK post-Brexit. Guernsey's financial services regulator (the Guernsey Financial Services Commission (**GFSC**)) has

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signed a Memorandum of Understanding (**MoU**) with the UK's Financial Conduct Authority which ensures Guernsey firms can continue to use the UK's National Private Placement Regime (**NPPR**) after Brexit. The MoU will come into effect on 1 January, once EU law no longer applies in the UK, either through a 'no deal' Brexit or at the end of the transition period.

For more information on Guernsey's fund industry post-Brexit please click here and see question 7.

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5. What has Guernsey done so far to protect its economy post-Brexit?

Guernsey has agreed to the extension of the UK's membership of the World Trade Organisation (**WTO**) so that it includes Guernsey. This is intended to provide trade security for imports and exports of goods and services between Guernsey and the EU (and the rest of the world).

The report published by the States of Guernsey Policy & Resources Committee in support of its proposal to extend the UK's membership of the WTO (**WTO Policy Letter**) identified that the benefits for Guernsey in joining the UK's WTO membership go far beyond Guernsey's trading relationship with the EU under Protocol 3, which is only in relation to agricultural goods. The WTO Policy Letter outlined that the benefits of joining the UK's WTO membership include:

- protection from arbitrary trading controls;
- greater opportunity for Guernsey to access any free trade agreements negotiated by the UK;
- potential for Guernsey to benefit from any mutual recognition agreements negotiated by the UK;
- access to global markets for goods and services;
- protection against unfair trade practices;
- access to the WTO Dispute Settlement Body;
- assisting overseas development.

The WTO Policy Letter can be found here and for information on the UK's membership of the WTO, please click here.

In addition, Guernsey has enacted The International Trade Agreements (Implementation) (Bailiwick of Guernsey) Law, 2018 which facilitates the implementation locally of international trade agreements (whether between the UK and the EU, other sovereign states, international organisations or the WTO), and the resolution of trade disputes arising under international trade agreements, without recourse to the UK or the EU.

Guernsey (together with the other Crown Dependencies) has also entered into a customs union with the UK which covers all trade in goods which eliminates any customs duty on imports and exports within the union, and adopts a common customs tariff in relations with third countries, to ensure trade between the UK and Guernsey is unaffected by Brexit. This provides continuity for Guernsey and certainty for businesses as regards UK counterparty arrangements.

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6. What about representation in the EU after Brexit?

Historically the UK has been responsible for representing the Channel Islands in external negotiations with the EU but over recent years this position has been changing. For example, Guernsey has entered into Tax Information Exchange Agreements with all 28 of the EU member states. The UK has also so far made it clear that it will negotiate a new economic partnership for Guernsey (along with Jersey and the Isle of Man) that is commensurate with Guernsey's economic needs.

In 2011, the Channel Islands Brussels Office (**CIBO**) was established to promote the interests of the Channel Islands in Europe, to represent the Channel Islands to the EU institutions, and to advise the governments of Guernsey and Jersey on EU policy issues. Politicians from both islands regularly travel to Brussels to meet with representatives of the EU institutions and both islands have committed to ensuring that they continue to have strong relationships across Europe, irrespective of Brexit.

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7. I run an investment fund. We have investors in EU and non-EU states. Will anything change?

In short, no. It is expected to be 'business as usual' for Guernsey funds.

As a third country, Guernsey has in certain circumstances elected to comply with EU Directives, for example the Alternative Investment Fund Managers Directive (**AIFMD**). Guernsey has passed equivalent legislation to facilitate access to EU markets.

Under AIFMD, the NPPR applies until such time as a marketing passport for third countries is made available. The NPPR permits the marketing of non-European Economic Area (**EEA**) alternative investment funds in the EEA, subject to national law and regulation in force in the relevant country. In addition, certain conditions set out in AIFMD must be met. Those conditions include the need for supervisory cooperation agreements to be entered into between the GFSC and regulators in the relevant EEA countries in which the marketing is to take place. Guernsey has managed to secure cooperation agreements with regulators in 27 out of the 31 EEA countries.

The GFSC has issued AIFMD Marketing Rules to help ensure compliance by Guernsey investment funds and their managers with the AIFMD NPPR conditions. Opt-in AIFMD Rules have also been introduced. This allows Guernsey fund managers and depositaries to opt in to a set of Guernsey rules which are aimed at achieving compliance with the full scope of AIFMD (rather than just NPPR requirements), should they wish to do so.

In brief, Guernsey funds are eligible to be marketed into the EU and EEA in accordance with the provisions of the AIFMD through both:

- the NPPR; and

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- third-country passporting regime (if and when available, although there is likely to be reduced appetite on the part of European regulators to pursue this post-Brexit).

AIFMD is not relevant to Guernsey funds with a Guernsey manager which markets outside the EU/EEA. These will continue to be subject to the laws of the countries in which the fund is marketed.

We believe that Brexit should cause little impact on Guernsey fund managers and Guernsey funds. To the extent that any such entities comply with EU Directives, there is no expectation that those requirements will change as a result of Brexit. Further, the manner in which Guernsey funds are marketed into the UK is likewise unlikely to change.

Click here for the Guernsey Investment Fund Association's thoughts on Brexit and Guernsey's fund industry.

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8. Will the sanctions regime in Guernsey change after Brexit?

It should be noted that the UN and the EU are key bodies that adopt sanctions measures which may include the following measures:

- Financial sanctions including asset freezes and investment bans;
- Travel bans;
- Import and Export bans;
- Arms embargo; and/or
- Trade restrictions.

Traditionally, the Bailiwick sanctions regime allowed it to adopt those sanctions through various mechanisms. UN sanctions measures are sometimes implemented by an Order in Council under the United Nations Act 1946. More commonly, sanctions were implemented by way of an Ordinance under the European Communities (Implementation) (Bailiwick of Guernsey) Law, 1994 (as amended) which provided that a particular EU Regulation imposing sanctions is to be treated as part of domestic law. EU sanctions included any relevant UN measures. Sanctions relating to export and import controls were then implemented by an Order made under the Export Control (Bailiwick of Guernsey) Law, 2006.

In May 2018 the UK passed the Sanctions and Anti-Money Laundering Act 2018 (Sanctions Act), to govern UK's post-Brexit sanctions regime. As a consequence of the introduction of the Sanctions Act, Guernsey has enacted the Sanctions (Bailiwick of Guernsey) Law, 2018 (**Sanctions Law**), which ensures that Guernsey has its own measures in place to be able to move in tandem with the EU, UN and UK as it chooses to.

The Bailiwick's sanctions regime under the Sanctions Law operates completely independently of those in other jurisdictions. The Sanctions Law enables Guernsey, as it sees fit, to continue to implement EU sanctions measures, make provision for the temporary implementation of UN financial sanctions listings and permits the

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future enactment of regulations in the Bailiwick of Guernsey to correspond to sanctions measures that the UK may issue under the Sanctions Act.

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9. My business is part of a group with offices in Guernsey and Europe. We share customer data across the group. We have spent a lot of money on GDPR advice. Do we have to start again?

A 'no deal' Brexit may well compromise the transfer of data between the UK and Europe. However, regardless of whatever form the outcome of Brexit takes, Guernsey has agreements in place to ensure it can trade data with EU members and the UK. For further details, see our separate data protection note here which considers data protection in light of a 'no deal' Brexit and flags the areas of concern for those operating in the UK and Europe.

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10. My tenant in London plans to relocate after Brexit and wishes to terminate the lease. Can they do that?

That will primarily depend on the terms of the lease.

If the lease contains a break clause or specifically entitles the tenant to terminate the lease in the event that the UK leaves the EU (or potentially, if the transition period ends with a "no-deal" Brexit), then potentially the tenant may exercise its break or seek to terminate the lease after Brexit (provided it complies with any requirements in the lease).

Whilst a break clause would not be unusual, most leases in our experience do not include such specific Brexit termination clauses. Even if the termination clause does not give the tenant an escape route, or indeed if there is no termination clause, there may be other clauses in the lease that the tenant could try to rely on. For example, any force majeure clause or material adverse change clause (for further information on considerations relating to these clauses, please see our briefing here in the context of COVID-19). Whether the tenant would be entitled to rely on any such provision to terminate the lease would depend on the circumstances and the exact wording of the lease – legal advice should be sought before any agreement to terminate is reached.

We have however, seen that a tenant has attempted to terminate a lease by claiming that the lease has been frustrated by Brexit, meaning Brexit has made the lease impossible to perform.

The High Court rejected a claim that a lease had been frustrated by Brexit when the European Medicines Agency (**EMA**) attempted to terminate the lease of its headquarters in Canary Wharf. The EMA claimed it was being forced to move its headquarters to continental Europe as a result of Brexit. The judge found that Brexit had not made the lease impossible to perform – there was no rule of law that required the EMA to have its headquarters within the EU and the EMA would still be able to comply with its obligations under the lease after the UK had left the EU. Accordingly, Brexit was not a frustrating event in that case. Click here for our insight on the case. However, depending on what the final relationship is between the EU and the UK, we may see tenants trying to terminate leases on similar grounds again, especially if there is a "no-deal" Brexit.

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The same principles are relevant to all commercial contracts that may be affected by Brexit. Parties concerned that Brexit may lead to uneconomic or disadvantageous consequences should review their contracts, engage with counterparties to mitigate risks and, where necessary, take appropriate legal advice.

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11. What do I need to do to Brexit-proof my contracts?

Businesses should be reviewing their operations to see where they are likely to be affected by Brexit. The obvious areas will be supply-chain issues (even if businesses don't trade directly with EU states), pricing, penalty for delays, staffing (discussed here), IT, data protection (discussed here).

When reviewing current contracts or entering into new contracts consider whether it is appropriate to include a Brexit-clause to provide for certain consequences to flow in the event of a no-deal Brexit or even a Brexit deal which adversely affects one or more parties. It may also be useful to build in change management processes into certain contracts. As noted above, frustration can be difficult to prove as a reason for terminating a contract, and force majeure clauses may not be effective. Clear drafting around Brexit will be needed. It may not be possible to Brexit-proof all operational aspects of any business but steps can be taken to mitigate its impact. It is not too soon for businesses to start reviewing their contracts.

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12. Some of my staff are from EU member states. Will they be forced to leave?

No. The States of Guernsey has given a commitment to secure the rights of EU citizens and their family members resident in Guernsey once the UK leaves the EU.

Guernsey introduced an EU Settlement Scheme, similar to the scheme proposed in the UK, on 1 April 2019. The simple application process is provided free of charge in line with the UK and will enable EU citizens, and their family members, resident in Guernsey at the point that the UK leaves the EU to have their immigration rights secured by applying for 'Settled Status' or 'further permission to remain'. The scheme is intended to remain open for applications until 30 June 2021 to ensure everyone affected has the opportunity to register.

Information about the scheme and how to apply can be found here.

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13. Will I need a visa to travel to the UK or Ireland?

No. The UK, Ireland, Guernsey, Jersey and the Isle of Man are all part of the Common Travel Area (**CTA**), which reflects a long-standing constitutional arrangement enabling citizens to move freely between, and reside in, these jurisdictions. After the UK leaves the EU (no matter what the terms of the UK's exit), those rights will continue.

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14. What impact is Brexit having on the property market?

Any negative effect that Brexit may have had on the property market has effectively been neutralized by the coronavirus pandemic. Against expectations, the Island's residential property market has boomed since the end of the lockdown earlier this year, with asking prices being met and in some cases exceeded. As of writing the market is still hot. There has also been a large increase in enquiries from people looking to relocate to Guernsey, largely driven by the Island's successful approach to managing the spread of the virus, which saw an end to lockdown and social distancing measures during the Summer. In the commercial sector, despite concerns last year of decreased levels of activity and perceived nervousness of investors, the property market has shown resilience and confidence, with a number of high end office and other commercial buildings being acquired, with investment and development in this market continuing.

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15. So is Brexit a good thing for Guernsey?

It is generally thought that in a number of key areas (such as the financial services industry and data protection) the impact of Brexit will be minimal and that actually Brexit presents opportunities for businesses in Guernsey.

At an administrative level, businesses may need to update documents such as policies and procedures and contracts to account for the UK no longer being part of the EU.

In the funds space, Guernsey's National Private Placement Regime remains best in class for accessing EU investors and there may be additional opportunities for Guernsey (rather than our EU competitors, such as Luxembourg) to provide structures via which UK investors can invest in UK assets.

On 12 March 2019, the European Council of Finance Ministers confirmed Guernsey's status as a transparent and cooperative jurisdiction, and that Guernsey's legal substance requirements are considered compliant with EU requirements. The effect of this is that the European Investment Fund (being a specialist provider of risk finance for small and medium-sized enterprises across Europe, backed by the European Investment Bank, EU, and a range of public and private banks and finance institutions) is once again able to invest into Guernsey funds. This means that Guernsey funds have been reopened to millions of Euros of potential investments.

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16. Is Guernsey in a good position to deal with a post-Brexit world?

The establishment of the CIBO, a closer working relationship with Jersey and more regular engagement with international counterparties are just some of the reasons contributing to Guernsey's enhanced external relations. Guernsey now has the resources, ability, skills and experience to equip itself for whatever challenges the post-Brexit world brings.

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Thankfully, we see Guernsey facing challenges of a much smaller magnitude than those faced by the UK. Guernsey has shown that it is able to adapt and innovate time and again and in light of the changing landscape Brexit will bring, Guernsey must continue to be alert and responsive to change as it enters a post-Brexit world, whatever that world may eventually look like.

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For more information please contact:



Wayne Atkinson

Partner (Advocate) | Guernsey

t: +44 (0) 1481 734225 | **e:** wayne.atkinson@collascrill.com



Paul Nettleship

Consultant (Advocate) | Guernsey

t: +44 (0) 1481 734200 | **e:** paul.nettleship@collascrill.com



Ben Le Page

Partner (Advocate)^ | Guernsey

t: +44 (0) 1481 734244 | **e:** ben.lepage@collascrill.com

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