BREXIT AND JERSEY - 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 Jersey) 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 Jersey 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, Jersey'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 Jersey. Despite ongoing uncertainty, Jersey 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 Jersey, irrespective of whether there is a "deal" or "no deal".

Whilst the Government of Jersey'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 Jersey 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 Jersey businesses.

Frequently Asked Questions

1. I thought Jersey was outside the EU. Why are we bothered by Brexit?
2. Protocol 3 – what is that? What will happen to Protocol 3 after Brexit?
3. EU laws are not effective in Jersey anyway, right?
Many businesses in Jersey have commercial ties with the UK and/or the EU, whether as part of the same corporate group as businesses in London caused by Brexit is likely to be felt in Jersey. Of particular note is Jersey’s relationship with the City of London. The growth and success that Jersey 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 is likely to be felt in Jersey.

**Jersey’s relationship with the EU**

Jersey 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 Jersey and the EU. This will no longer be the case after Brexit.

**Commercial relationships**

Many businesses in Jersey 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.

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 Jersey 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 Jersey 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 Jersey, subject to any conditions imposed by the EU.

Under Protocol 3 Jersey 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.

Jersey has enacted the European Union (Repeal and Amendment) (Jersey) Law 2018 (Brexit Law), which will come into force at the end of the transition period, to repeal the domestic legislation which had been implemented to bring the provisions of Protocol 3 into force in Jersey, together with additional enabling legislation to facilitate the new post-Brexit environment.

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

Yes and no. In short, EU laws are not applicable in Jersey 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

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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 Jersey

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

Jersey has taken steps to retain control over European legislation which is directly applicable in Jersey by enacting the Brexit Law which, from the end of the transition period:

- repeals the EU Law and turns off the flow of European legislation which was directly applicable in Jersey pursuant to Protocol 3;
- preserves in domestic law any directly applicable EU legislation which had effect in Jersey 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 Jersey after exit day.

Other EU laws

Where Directives may be applicable under Protocol 3, they can be implemented locally by Regulations or Orders under the European Union Legislation (Implementation) (Jersey) Law 2014 (Implementation Law). At that point, they become domestic law and have legal force in Jersey by virtue of being Jersey law, rather than European law.

Jersey can also voluntarily implement any provision of EU 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. Jersey has also adopted (by enacting domestic legislation) some aspects of EU legislation in compliance with bilateral agreements in place between Jersey and member states of the EU, for example agreements relating to the exchange of tax information.

Such domestic legislation will continue in force in Jersey 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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If a deal is agreed between the UK and the EU and, as anticipated, the deal includes a transition period where the UK’s agreement with the EU and obligations towards the EU will be maintained for a period post-Brexit (the Transition Period), Jersey will only repeal the 1973 law when the Transition Period comes to an end.
Other EU laws

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

Goods

Firstly, remember that Protocol 3 only provides for the trade in goods (not services) between Jersey and the EU. Horticultural products, and in particular Jersey Royal potatoes and milk from Jersey cows, represent important export products for Jersey, and go mostly to the UK. Jersey also imports a number of products from the UK and the wider EU, including industrial equipment, food and fuel.

In any event, most of the goods exported from Jersey 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, Jersey 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

Jersey is also a significant exporter of services to the EU, the UK and globally in certain industry sectors, particularly financial services. Jersey 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 Jersey's economy that the export of services to the EU (and the UK) is not affected by Brexit.

Jersey 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.

Jersey has also taken steps to ensure continued market access for Jersey investment funds into the UK post-Brexit. Jersey’s financial services regulator (the Jersey Financial Services Commission (JFSC)) has signed a Memorandum of Understanding (MoU) with the
UK’s Financial Conduct Authority which ensures Jersey firms can continue to use the UK’s National Private Placement Regime (NPPR) after Brexit. The MoU will come into effect on 1 January 2021, once EU law no longer applies in the UK, either through a ‘no deal’ Brexit or at the end of the transition period.

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

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

Jersey (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 Jersey is unaffected by Brexit. This provides continuity for Jersey and certainty for businesses as regards UK counterparty arrangements.

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, Jersey has entered into Tax Information Exchange Agreements with most EU member states. The UK has also so far made it clear that it will negotiate a new economic partnership for Jersey (along with Guernsey and the Isle of Man) that is commensurate with Jersey’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 Jersey and Guernsey 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.

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 Jersey funds. From a practical perspective, the notification process with the UK Financial Conduct Authority (FCA) is expected to remain essentially the same. The JFSC has also arranged to update the relevant Jersey policy related to the Alternative Investment Fund Managers Directive (AIFMD), code of practice, regulations and guidance so that a materially similar approach can continue in Jersey for both private placement under AIFMD and in the UK under its new regime.

United Kingdom
The JFSC entered into a memorandum of understanding with the FCA in March 2019 providing certainty that access by Jersey funds and managers to UK investors will continue uninterrupted and irrespective of any Brexit outcome.

**European Union**

Jersey is not and has never been part of the EU. Rather, as a third country, Jersey will maintain access to the EU funds markets as a result of agreements between the JFSC and financial regulators in 27 of the 31 European Economic Area (EEA) States.

As a third country, Jersey has in certain circumstances elected to comply with EU Directives, for example the AIFMD. Jersey 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-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 JFSC and regulators in the relevant EEA countries in which the marketing is to take place. Jersey has managed to secure cooperation agreements with regulators in 27 out of the 31 EEA countries.

The JFSC has published Codes of Practice in respect of AIFMD (the Jersey AIF Codes) to help ensure compliance by Jersey managers with the AIFMD NPPR conditions. (The Jersey AIF Codes also include opt-in provisions to allow Jersey managers and depositaries to opt in to a set of Jersey rules which are aimed at achieving compliance with the full scope of AIFMD, should they wish to do so.)

Jersey funds are currently eligible to be marketed into the EU and EEA in accordance with the provisions of the AIFMD through the NPPR regime. AIFMD made provision for "third countries" to be granted the same passporting rights as EU member states, subject to certain conditions being met (Third Countries). ESMA published its assessment of potential "first wave" Third Countries and along with Guernsey and Switzerland found that were no significant obstacles to Jersey becoming a Third Country jurisdiction. The EU Commission has not yet pressed ahead with the implementation of the third country passporting regime, but in light of Brexit this is likely to gain greater focus and the indications are that if and when the regime is put in place Jersey will be amongst the first non-EU countries to be granted passporting rights.

**The Rest of the World**

AIFMD is not relevant to Jersey funds with a Jersey 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.

8. **Will the sanctions regime in Jersey 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 Jersey 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 Regulations or Orders under the Implementation Law, 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.

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, Jersey has enacted the Sanctions and Asset-Freezing (Jersey) Law 2019 (Sanctions Law), which ensures that Jersey has its own measures in place to be able to move in tandem with the EU, UN and UK as it chooses to.

Jersey’s sanctions regime under the Sanctions Law operates completely independently of those in other jurisdictions. The Sanctions Law enables Jersey, 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 future enactment of regulations in Jersey to correspond to sanctions measures that the UK may issue under the Sanctions Act.

9. My business is part of a group with offices in Jersey 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, Jersey has agreements in place to ensure it can trade data with EU members and the UK. In 2018 Jersey adopted the Data Protection (Jersey) Law 2018 which ensured that the island maintained an "equivalence" standard with GDPR to ensure that data could continue to pass from the EU to Jersey and vice-versa.

10. My company owns property in London which is leased to a company based in London. I have heard that after Brexit the tenant company will be relocating to within the EU and will want 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. 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.

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.

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

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

Jersey introduced an EU Settlement Scheme, similar to the scheme proposed in the UK, on 11 February 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 Jersey at the point that the UK leaves the EU to have their immigration rights secured by applying for 'Settled Status' if they have been resident in Jersey for at least 5 years, or "Pre-Settled Status" if they have been resident in Jersey for less than five years, which will convert to Settled Status once they have reached the five year residency threshold. The scheme is intended to remain open for applications until 30 June 2021 to ensure everyone affected has the opportunity to register. To be eligible for the scheme, EU citizens must have arrived in Jersey on or before 31 December 2020.
12. Will I need a visa to travel to the UK or Ireland?

No. The UK, Ireland, Jersey, Guernsey 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.

13. So is Brexit a good thing for Jersey?

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 Jersey.

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, Jersey's National Private Placement Regime remains best in class for accessing EU investors and there may be additional opportunities for Jersey (rather than our EU competitors, such as Luxembourg) to provide structures via which UK investors can invest in UK assets. In addition, managers in the UK, US and elsewhere may be able to launch funds in a shorter time-frame and with lighter ongoing regulatory requirements than in an EU member state such a Luxembourg.

On 12 March 2019, the European Council of Finance Ministers confirmed Jersey's status as a transparent and cooperative jurisdiction, and that Jersey's legal substance requirements are considered compliant with EU requirements. The effect of this is that the European Investment Fund (the EIF) (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) confirmed that there is no impediment to the EIF investing in Jersey private equity or venture capital funds, meaning that Jersey funds continue to be open to billions of Euros of potential investments.

14. Is Jersey in a good position to deal with a post-Brexit world?

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

Thankfully, we see Jersey facing challenges of a much smaller magnitude than those faced by the UK. Jersey has shown that it is able to adapt and innovate time and again and in light of the changing landscape Brexit will bring, will 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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