# How to protect your creative business after Brexit?

## On 30 March 2019, the UK will crash out of the EU without a withdrawal deal in place, and without a request for an extension of the 2 years' notification period of its decision to withdraw. No second referendum will be organised by the current UK government. Therefore, what's in the cards, for the creative industries, in order to do fruitful business with, and from, the UK in the near future?


My previous article on the road less travelled & Brexit legal implications, published just after the Brexit vote, on Saturday 25 June 2016, delivered the main message that it was worth monitoring the negotiation process that would ensue the notification made by the United Kingdom ("**UK**") to the European Union ("**EU**") of its intention to withdraw from the EU within 2 years.

We have therefore been monitoring those negotiations for you, in the last couple of years, and came to the following predictions, which will empower your creative business to brace itself for, and make the most of the imminent changes triggered by, the crashing of the UK out of the EU, on 30 March 2019.

## 1. End of freedom of movement of UK and EU citizens coming in and out of the UK

On 30 March 2019, UK citizens will lose their EU citizenship, i.e. the citizenship, subsidiary to UK citizenship, that provide rights such as the right to vote in European elections, the right to free movement, settlement and employment across the EU, and the right to consular protection by other EU states' embassies when a person's country of citizenship does not maintain an embassy or consulate in the country in which they require protection.

Since no withdrawal agreement will be signed by 29 March 2019, between the EU and the UK, UK nationals living in one of the 27 EU member-states will be on their own, as no reciprocal arrangements will have been put in place, in particular in relation to reciprocal healthcare and social security coordination, work permits, right to stand and vote in local elections.

UK nationals living in one of the states which are members of the European Free Trade Association ("**EFTA**"), i.e. Iceland, Liechtenstein, Norway and Switzerland, will also have no safety net, as the UK will also crash out of the EU bilateral agreements with EFTA members, such as the agreement on the European Economic Area ("**EEA**") which ties Iceland, Liechtenstein, Norway and the EU together, on 29 March 2019. Meanwhile, "*the UK is seeking citizens' rights agreement with the EFTA states to protect the rights of citizens*", as set out on the policy paper published by the UK Department for exiting the EU.

It therefore makes sense for UK nationals living in a EU member-state, or in one of the EFTA states, to reach out to the equivalent of the UK Home Office in such country, and inquire how they can secure either a visa or national citizenship in this country. Since negotiating some new bilateral agreements with EU member-states and EFTA states will take years, for the UK to finalise such negotiations, UK nationals cannot rely on these protracted talks to get any leverage and obtain permanent right to remain in a EU member-state or an EFTA state.

For example, France is ready to pass a decree after 30 March 2019, to organise the requirement to present a visa to enter French territory, and to obtain a residency permit ("*carte de séjour*") to justify staying here, for UK citizens already living, or planning to live for more than three months, in France. Therefore, soon after 30 March 2019, British nationals and their families who do not have residency permits may have an "irregular status" in France.

While applying for a "*carte de séjour*" is free in France, and applying for French citizenship triggers only a 55 euros stamp duty to pay, EU nationals living in the UK, or planning to live in the UK, won't be so lucky.

Indeed, it will set EU nationals back GBP1,330 per person, from 6 April 2018, to obtain UK citizenship, including the citizenship ceremony fee. However, there may be no fee to enrol into the EU Settlement Scheme, which will open fully by 30 March 2019, in particular if a EU citizen already has a valid "*UK permanent residence document or indefinite leave to remain in or enter the UK*". The deadline for applying in the EU Settlement Scheme will be 31 December 2020, when the UK leaves the EU without a withdrawal deal on 30 March 2019.

Business owners and creative companies working in and from the

UK will be impacted too, if they have some employees and staff. It will be their responsibility to ensure and be able to prove that their staff who are EU citizens, have all obtained a settled status: in a display of largesse, the UK government has therefore published an employer toolkit, to "*support EU citizens and their families to apply to the EU Settlement Scheme*".

For short term stays of less than three months per entry, the UK government currently promises that "*arrangements for tourists and business visitors will not look any different*. *EU citizens coming for short visits will be able to enter the UK as they can now, and stay for up to three months from each entry*".

To conclude, leaving the EU without a withdrawal agreement is going to create a lot of red tape, and be a massive time and energy hassle for EU citizens living in the UK, their UK employers who need to ensure that their staff are all enrolled into the EU Settlement Scheme, and for UK citizens living in one of the remaining 27 EU member-states. There will be no certainty of obtaining settled status from the UK Home Office, until EU citizens have actually obtained it further to enrolling into the EU Settlement Scheme. This is going to be a very anxiety-inducing process for EU citizens living in the UK, and for their UK employers who rely on these members of their staff to get the job done.

Contingency plans should therefore be put in place by UK employers who have EU citizens on their payroll, in particular by setting up offices and subsidiaries in one of the remaining 27 EU member-states, so that EU citizens whose settled status was refused by the UK Home Office may keep on working for their UK employers by relocating to this EU member-state where they will have freedom of movement thanks to their EU citizenships. Besides the Home Office and immigration lawyers' fees, UK employers need to take into account the legal, accounting, IT and real estate costs of setting up additional offices and subsidiaries in a EU member-state, after 30 March 2019.

# 2. Removal of free movement of goods, services and capital

The EU internal market, or single market, is a single market that seeks to guarantee the free movement of goods, capital, services and people – the "four freedoms" – between the EU 28 member-states.

After 30 March 2019, the single market will no longer count the UK, as it will cease to be a EU member-state.

While it was an option for the internal market to remain in place, between the UK and the EU, as such market has been extended to EFTA states Iceland, Liechtenstein and Norway through the EEA agreement, and to EFTA state Switzerland through bilateral treaties, this alternative was not pursued by the UK government. Indeed, the EEA Agreement and EU-Swiss bilateral agreements are both viewed by most as very asymmetric (Norway, Iceland and Liechtenstein are essentially obliged to accept the internal single market rules without having much if any say in what they are, while Switzerland does not have full or automatic access but still has free movement of workers). The UK, as well as EFTA members who were less than keen to have the UK join their EFTA club, ruled out such option, not seeing the point of still contributing to the EU budget while not having a seat at the table to take any decisions in relation to how the single market is governed and managed.

## 2.1. Removal of free movement of goods and new custom duties and tariffs

As far as the removal of the free movement of goods is concerned, it will be a – hopefully temporary – hassle, since the UK does not have any bilateral customs and trade agreements in place with the EU (because no withdrawal agreement will be entered into between the EU and the UK by 30 March 2019) and with non-EU countries (because the 53 trade agreements with non-EU countries were secured by the EU directly, on behalf of its then 28 member-states, including with Canada, Singapore, South Korea).

On 30 March 2019, the UK will regain its right to conclude binding trade agreements with non-EU countries, and with the EU of course.

While the UK government laboriously launches itself into the negotiation of at least 54 trade agreements, including with the EU, customs duties will be reinstated between the UK and all other European countries, including the UK. This is going to lead to a very disadvantageous situation for UK businesses, as the cost of trading goods and products with foreign countries will substantially increase, both for imports and exports.

Creative companies headquartered in the UK, which export and import goods and products, such as fashion, design and tech companies, are going to be especially at risk, here, with the cost of imported raw material increasing, and the rise or appearance of custom duties on exports of their products to the EU and non-EU countries. Fashion and luxury businesses, in particular, are at risk, since they export more than seventy percent of their production overseas.

Since the UK has most of its trade (57 percent of exports and 66 percent of imports in 2016) done with countries bound by EU trade agreements, both UK companies and UK consumers must brace themselves for a shock, when they will start trading after 30 March 2019. The cost of life is going to become more expensive in the UK (since most products and goods are imported, in particular from EU member-states), and operating costs are also going to increase for UK businesses.

While some Brexiters claim that the UK will be fine, by reverting to trading with the "rest of the world" under the rules of the World Trade Organisation ("**WTO**"), it is important to note that right now, only 24 countries are trading with the UK on WTO rules (like any one of the 28 member-states of the EU because no EU trade deal was concluded with these non-EU countries). After 30 March 2019, the UK will trade with the rest of the world under WTO rules, as long as the other state is also a member of the WTO (for example, Algeria, Serbia and North Korea are not WTO members). Moreover, some tariffs will apply to all UK exports, under those WTO rules.

It definitely does not look like a panacea to trade under WTO rules, so the UK government and its Bank of England will weaken the pound sterling as much as possible, to set off the financial burden represented by these custom duties and taxes.

Creative companies headquartered in the UK, which export goods and products, such as fashion and design companies, should now relocate their manufacturing operations to the EU or low wages and low tax territories, such as South East Asia, as soon as possible, to avoid the new customs duties and taxation of goods and products which will inevitably arise, after 30 March 2019.

While a cynical example, since James Dyson was a fervent Brexiter who called on the UK government to walk away from the EU without a withdrawal deal, UK creative businesses manufacturing goods and products must emulate vacuum cleaner and hair dryer technology company Dyson, that will be moving its headquarters from Wiltshire to Singapore this year.

Moreover, the UK will face non-tariff barriers, in the same way that China and the US trade with the EU. Non-tariff barriers are any measure, other than a customs tariff, that acts as a barrier to international trade, such as regulations, rules of origin or quotas. In particular, regulatory divergence from the EU will make it harder to trade goods, introducing non-tariff barriers: when the UK will leave the EU customs union, on 30 March 2019, any goods crossing the border will have to meet rules of origin requirements, to prove that they did indeed come from the UK – introducing paperwork and non-tariff barriers.

## 2.2. Removal of free movement of services and VAT changes

On 30 March 2019, UK services – accounting for eighty percent of the UK economy – will lose their preferential access to the EU single market, which will constitute another non-tariff barrier.

The free movement of services and of establishment allows self-employed persons to move between member-states in order to provide services on a temporary or permanent basis. While services account for between sixty and seventy percent of GDP, on average, in all 28 EU member-states, most legislation in this area is not as developed as in other areas.

There are no customs duties and taxation on services, therefore UK creative industries which mainly provide services (such as the tech and internet sector, marketing, PR and communication services, etc) are less at risk of being detrimentally impacted by the exit of the UK from the EU without a withdrawal agreement.

However, since the UK will become a non-EU country from 30 March 2019 onwards, EU businesses and UK business alike will no longer be able to apply the EU rules relating to VAT, and in particular to intra-community VAT, when they trade with UK and EU businesses respectively. This therefore means that, from 30 March 2019 onwards, a EU business will no longer charge VAT to a UK company, but will keep on charging VAT to its UK client who is a natural person. Also, a UK business will no longer charge VAT to a EU company, but will keep on charging VAT to its EU client who is a natural person.

Positive changes on VAT are also in the works, because the UK will no longer have to comply with EU VAT law (on rates of VAT, scope of exemptions, zero-rating, etc.): the UK will have more flexibility in those areas.

However, there will no doubt be disputes between taxpayers and HMRC over the VAT treatment of transactions that predate 30 March 2019, where EU law may still be in point. Because the jurisdiction of the Court of Justice of the European Union (“**CJEU**”) will cease completely in relation to UK matters on 30 March 2019, any such questions of EU law will be dealt with entirely by the UK courts. Indeed, UK courts have stopped referring new cases to the CJEU in any event, since last year.

## 2.3. Removal of free movement of capital and loss of passporting rights for the UK financial services industry

Since the UK will leave the EU without a withdrawal agreement, free movement of capital, which is intended to permit movement of investments such as property purchases and buying of shares between EU member-states, will cease to apply between the EU and the UK on 30 March 2019.

Capital within the EU may be transferred in any amount from one country to another (except that Greece currently has capital controls restricting outflows) and all intra-EU transfers in euro are considered as domestic payments and bear the corresponding domestic transfer costs. This EU central payments infrastructure is based around TARGET2 and the Single Euro Payments Area (“**SEPA**”). This includes all member-states of the EU, even those outside the eurozone, provided the transactions are carried out in euros. Credit/debit card charging and ATM withdrawals within the Eurozone are also charged as domestic.

Since the UK has always kept the pound sterling during its 43 years’ stint in the EU, absolutely refusing to ditch it for the euro, transfer costs on capital movements – from euros to pound sterling and vice versa – have always been fairly high in the UK anyway.

However, as the UK will crash out of the EU without a deal on 30 March 2019, such transfer costs, as well as new controls on capital movements, will be put in place and impact creative businesses and professionals when they want to transfer money from the UK to EU member-states and vice-versa. While the UK government is looking to align payments legislation to maximise the likelihood of remaining a member of SEPA as a third country, the fact that it has decided not to sign the withdrawal agreement with the EU will not help such alignment process.

The cost of card payments between the UK and EU will increase, and these cross-border payments will no longer be covered by the surcharging ban (which prevents businesses from being able to charge consumers for using a specific payment method).

It is therefore advisable for UK creative companies to open business bank accounts, in euros, either in EU countries which are strategic to them, or online through financial services providers such as Transferwise's borderless account. UK businesses and professionals will hence avoid being narrowly limited to their UK pound sterling denominated bank accounts and being tributary to the whims of politicians and bureaucrats attempting to negotiate new trade agreements on freedom of capital movements between the UK and the EU, and other non-EU countries.

Also, forging ties with banking, insurance and other financial services providers in one of the remaining 27 member-states of the EU may be really useful to UK creative industries, after 30 March 2019, because the UK will no longer be able to carry out any banking, insurance and other financial services activities through the EU passporting process. Indeed, financial services is a highly regulated sector, and the EU internal market for financial services is highly integrated, underpinned by common rules and standards, and extensive supervisory cooperation between regulatory authorities at an EU and member-state level. Firms, financial market infrastructures, and funds authorised in any EU member-state can carry out many activities in any other EU member-state, through a process known as "passporting", as a direct result of their EU authorisation. This means that if these entities are authorised in one member-state, they can provide services to customers in all other EU member-states, without requiring authorisation or supervision from the local regulator.

The European Union (Withdrawal) Act 2018 will transfer EU law, including that relating to financial services, into UK statutes on 30 March 2019. It will also give the UK government powers to amend UK law, to ensure that there is a fully functioning financial services regulatory framework on 30 March 2019.

However, on 30 March 2019, UK financial services firms' position in relation to the EU will be determined by any applicable EU rules that apply to non-EU countries at that time. Therefore, UK financial services firms and funds will lose their passporting rights into the EU: this means that their UK customers will no longer be able to use the EU services of UK firms that used to passport into the EU, but also that their EU customers will no longer be able to use the UK services of such UK firms.

For example, the UK is a major centre for investment banking in Europe, with UK investment banks providing investment services and funding through capital markets to business clients across the EU. On 30 March 2019, EU clients may no longer be able to use the services of UK-based investment banks, and UK-based investment banks may be unable to service existing cross-border contracts.

## 3. Legal implications of Brexit in the UK

On 30 March 2019, the European Union (Withdrawal) Act 2018 (the “**Act**”) will take effect, repeal the European Communities Act 1972 (the “**ECA**”) and retain in effect almost all UK laws which have been derived from the EU membership of the UK since 1 January 1973. The Act will therefore continue to enforce all EU-derived domestic legislation, which is principally delegated legislation passed under the ECA to implement directives, and convert all direct EU legislation, i.e. EU regulations and decisions, into UK domestic law.

Consequently, the content of EU law as it stands on 30 March 2019 is going to be a critical piece of legal history for the purpose of UK law for decades to come.

Some of the legal practices which are going to be strongly impacted by the UK crashing out of the EU are intellectual property law, dispute resolution, financial services law, franchising, employment law, product compliance and liability, as well as tax.

In particular, there is no clarity from the UK government, at this stage, on how EU trademarks, registered with the European Union Intellectual Property Office (“**EUIPO**”) are going to apply in the UK, if at all, after 30 March 2019. The same goes for Registered Community Designs (“**RCD**”), which are also issued by the EUIPO.

At least, some clarity exists in relation to European patents: the UK exit from the EU should not affect the current European patent system, which is governed by the (non-EU) European Patent Convention. Therefore, UK businesses will be able to apply to the European Patent Office (“**EPO**”) for patent protection which will include the UK. Existing European patents covering the UK will also be unaffected. European patent attorneys based in the UK will continue to be able to represent applicants before the EPO.

Similarly, and since the UK is a member of a number of international treaties and agreements protecting copyright, the majority of UK copyright works (such as music, films, books and photographs) are protected around the world. This will continue to be the case, following the UK exit from the EU. However, certain cross-border copyright mechanisms, especially those relating to collecting societies and rights management societies, and those relating to the EU digital single market, are going to cease applying in the UK.

Enforcement of IP rights, as well as commercial and civil rights, is also going to be uncertain for some time: the UK will cease to be part of the EU Observatory, and of bodies such as Europol and the EU customs' databases to register intellectual property rights against counterfeiting, on 30 March 2019.

The EU regulation n. 1215/2012 of 12 December 2012, on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters, will cease to apply in the UK once it is no longer an EU member-state. Therefore, after 30 March 2019, no enforcement system will be in place, to enforce an English judgment in a EU member-state, and vice-versa. Creative businesses will have to rely on domestic recognition regimes in the UK and each EU member-state, if in existence. This will likely introduce additional procedural steps before a foreign judgment is recognised, which will make enforcement more time-consuming and expensive.

To conclude, the UK government seems comfortable with the fact that mayhem is going to happen, from 30 March 2019 onwards, in the UK, in a very large number of industrial sectors, legal practices, and cross-border administrative systems such as immigration and customs, for the mere reason than no agreed and negotiated planning was put in place, on a wide scale, by the UK and the EU upon exit of the UK from the EU. This approach makes no economic, social and financial sense but this is besides the point. Right now, what creative businesses and professionals need to focus on is to prepare contingency plans, as explained above, and to keep on monitoring new harmonisation processes that will undoubtedly be put in place, in a few years, by the UK and its trading partners outside and inside the EU, once they manage to find common ground and enter into bilateral agreements organising this new business era for the UK.

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