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Leaving the EU: the legal implications

Following the UK's referendum vote in favour of leaving the EU, this briefing considers the implications from a legal perspective.

Key points for business

- From a purely legal perspective, **nothing will change immediately** and businesses are likely to have some time in which to prepare for Brexit (see below).
- From a commercial perspective, however, uncertainty and market volatility may well have a more immediate effect.
- For example, trading partners or investors may seek to: (i) terminate or amend existing contracts; and/or (ii) postpone or abandon planned ventures.
- Businesses should therefore consider urgently whether any key relationships or initiatives may be disrupted by the immediate outcome of the vote itself.
- Looking at the longer term, businesses should start to plan for legal changes likely to follow Brexit. The table at the end of this note provides a useful starting point.

Legally, has anything changed?

Despite the vote to leave, the UK's membership of the EU continues until it has formally withdrawn.

The official view of the UK government is that the only appropriate mechanism for withdrawal is

Article 50 of the Treaty on European Union. This provides that, once the UK has given formal notice of its intention to leave, the remaining countries of the EU ("**rEU**") are obliged to negotiate and conclude arrangements for its withdrawal (a "**Withdrawal Treaty**" or "**WT**").

Negotiation of the WT is likely to take some time – probably at least several years. It follows that businesses will have time to prepare for the impact of Brexit, including the legal ramifications.

The official Vote Leave campaign has argued that it is open to the EU to agree an alternative withdrawal mechanism and that it would be preferable not to give notice under Article 50 immediately.

Timing

Under Article 50, the EU Treaties will cease to apply to the UK on the expiry of a period of **2 years** from the date the UK formally notifies the EU of its decision to leave (or the date on which a WT is concluded, if earlier). This 2 year period can be extended with the agreement of rEU member states. Many commentators consider that 2 years is unlikely to be long enough to negotiate a fully comprehensive WT.

UK Prime Minister David Cameron has indicated that he does not intend to serve notice under Article 50 immediately and that this will be a matter for his successor (expected to be in place by October). This would allow a period for informal talks with the European Commission and other EU member states. Vote Leave has also expressed a preference for agreeing a more flexible timetable for exit, ideally outside the framework of Article 50. Nevertheless, its stated aim is to conclude

negotiations by the time of the next UK general election in **May 2020** (just under 4 years away).

What needs to be agreed with the EU?

Vote Leave has said that it would seek a free trade agreement with the EU. This would involve a more "arm's length" relationship with the EU than other potential options, such as EEA membership (see our Briefing dated [March 2016](#) for more detail on the various different Brexit models). However, it may be some time before it becomes clear whether the UK government intends to pursue this approach. If it does, the recent EU-Canada free trade deal may provide a useful "template" for an EU-UK trade agreement relating to goods - and using it as a model would help to speed up the negotiations. However, the Canadian deal does not cover services, which account for a large proportion of the UK's exports to the EU.



We have prepared a [separate briefing](#) on the implications for UK-based financial services firms.

The UK will also need to agree new arrangements on a range of issues from the status of UK citizens living in other EU member states to whether certain pieces of EU legislation should continue to apply to the UK post-exit (e.g. recent EU legislation abolishing mobile phone roaming charges). Negotiations on some of these issues are likely to be complex and may make it difficult to conclude a genuinely comprehensive UK-EU settlement by 2020, as envisaged by Vote Leave.

How would national law be changed?

The process of "de-Europeanising" UK law could begin immediately, in the sense that the government could begin to consult on EU-derived laws which it wishes to change. However, repealing those laws before the UK had formally left the EU would be likely to amount to a breach

of the UK's obligations under the EU Treaties – and could therefore prejudice the exit negotiations with rEU member states. In some areas, it will also be necessary to wait until the UK-EU WT has been finalised, since the UK may eventually agree that it will maintain certain EU-derived laws.

In our view, it is unlikely to be possible to review all affected legislation by 2020, as this will be a very time-consuming and onerous task. It is therefore probable that some EU-derived legislation will have to be retained as part of UK law beyond that date – and the process of reviewing it is likely to continue for some years after Brexit.

What would change?

The table at the end of this briefing highlights some of the changes which could be expected to UK law - assuming the UK pursues a post-Brexit relationship with the EU based on a free trade agreement. In theory, such an arrangement could give the UK greater freedom to pursue deregulation and reduce costs for business. However, this "Brexit dividend" may prove challenging to deliver in practice:

- In significant areas, the UK may conclude that it is preferable to retain (and if necessary update) existing standards in order to achieve "equivalence" of laws and regulations (with a view to facilitating negotiation of trade agreements with the EU and other countries). There may also be a strong desire to be seen to be applying and upholding best international standards.
- This is particularly so in relation to markets such as financial services, where a "race to the bottom" could have an undesirable impact on market stability/reputation and would potentially undermine the integrity of financial markets.
- Some reforms may encounter significant domestic political opposition, especially given the current UK government's slim majority.
- Finally, in some areas of the economy, the scope for deregulation may be limited because efforts by successive governments to remove "red tape" mean that most of the "easy wins" have been implemented already.

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NOTE: The following assumes that the UK pursues a Brexit option which gives it significant freedom from existing EU rules, as envisaged by the official Vote Leave campaign. However, it is likely to be some time (probably several years) before any of these changes would take effect.

BREXIT: POTENTIAL LEGAL IMPLICATIONS	
CONTRACTS	<ul style="list-style-type: none">● Contracts referring to the EU/EEA or EU legislation: Brexit will necessitate the review/amendment of contracts referring to the EU/EEA as a territory or to EU legislation, particularly where it was assumed that the UK was included within the EU/EEA or that EU legislation applied.● Risk of termination etc: Potential for Brexit to act as a trigger for exercise of termination, force majeure, "material adverse change" or variation/"change control" rights.● Jurisdiction and disputes clauses: Brexit likely to create uncertainty over the treatment of jurisdiction and disputes clauses, particularly for contracts with parties based in rEU (see Disputes below).● Express provisions: Parties will need to consider to what extent the UK's formal departure from the EU (which has not yet taken place – and the details of which are unclear) may affect both existing and new contracts. Options include (i) expressly including or excluding the UK's departure from the EU from termination/force majeure provisions; (ii) giving the parties termination rights exercisable on that event; and/or (iii) providing for an alternative mechanism applicable on that event to support continuity of contract in a post-Brexit environment. However, as the precise consequences of Brexit are unclear at this stage, such provisions may be difficult to draft other than in fairly general terms.
COMMERCIAL/ TRADING LAW	<ul style="list-style-type: none">● Deregulation: Brexit without EEA membership (or similar arrangements requiring adherence to EU single market legislation) will create the potential for the UK to pursue a more deregulatory agenda in a wide range of areas often considered burdensome for business, such as consumer protection, safety and standards, product liability and environmental law.● 2 sets of rules: Such deregulatory measures will primarily benefit businesses focussed on the UK domestic market or on exporting to non-rEU countries; businesses trading with the rEU, however, will have to comply with two potentially divergent sets of rules (which could increase the regulatory burden on those businesses).● International standards: Where internationally-agreed standards are relevant (as is often the case in relation to product regulation, for example), the UK government may decide that it is preferable to retain those standards. In any case, contractual obligations may mean that businesses cannot avoid compliance with such standards.● Policy issues/political opposition: Where deregulation would imply a lowering of standards/levels of protection, this may ultimately be considered undesirable in policy terms and is also likely to meet political opposition from e.g. consumer groups and others.● Administrative challenges: Significant reform to trading regulation will be challenging to deliver in terms of time and government resources, as detailed consultation will be required on numerous, highly complex areas of law, which cannot simply be abolished "wholesale" (such as EU-derived laws regulating chemicals, water, waste, air quality and other environmental issues).
COMPETITION	<ul style="list-style-type: none">● Merger control: Certain transactions will no longer benefit from "one stop shop" merger control review under the EU Merger Regulation and will therefore potentially face additional scrutiny from the UK Competition and Markets Authority (CMA).● Vertical agreements: Brexit will potentially allow absolute territorial protection (currently prohibited under EU law) to be granted to distributors in the UK - although depending on the context, such agreements could still be subject to challenge under post-Brexit UK competition law.● UK competition law (abuse of dominance, cartels etc): Brexit will probably lead to more enforcement action by the CMA, as it will have sole jurisdiction in the UK (but will

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	<p>often be enforcing alongside the European Commission in relation to e.g. Europe-wide cartels). On Brexit, the UK could potentially choose to diverge from EU competition law, although it seems to us unlikely that this will be a priority area for reform.</p>
FINANCIAL SERVICES	<ul style="list-style-type: none"> ● Scope for change/repeal: A significant proportion of UK financial services regulation is derived from EU legislation, some with direct effect which could fall away automatically (e.g. MAR), while the UK will gain the ability to repeal or modify others. This will cover AIFMD, MiFID, CRD IV, the AML regime (and many others), possibly involving grandfathering arrangements pending implementation of new domestic rules in these areas. ● Passporting rights: The potential loss of passporting rights for UK firms operating in rEU and rEU firms into the UK; this may prompt financial institutions to establish new regulated entities in rEU. ● UCITS funds: Potential disruption to UCITS funds which must be domiciled in the EU, subject to transitional arrangements agreed between the UK and rEU. ● Flexibility: Brexit may allow greater flexibility in relation to EU measures such as the "bonus cap", capital requirements under the CRD IV regime or fund management and marketing rules under the AIFMD.
COMPANY/ SECURITIES LAW AND M&A	<ul style="list-style-type: none"> ● Company law: Companies Acts deeply embedded and likely to remain largely in place despite extensive derivation from 4th Company Law Directive. ● Capital markets: UK capital markets regime (in particular the Prospectus Rules and the Disclosure and Transparency Rules) largely derived from EU Directives and susceptible to reform but unlikely to be replaced wholesale. ● Takeover Code: Likely to remain in place since it mostly pre-dated the EU Takeovers Directive and is widely accepted. ● Passporting rights etc: Loss of "regulated market" status and prospectus passporting rights, although continued compliance with European standards applicable to regulated markets will facilitate capital raising across Europe post Brexit. ● Merger clearance: Obtaining merger clearance for certain transactions likely to become more onerous (see "Competition" above). ● Prospectuses etc: Brexit risk factors may appear in capital markets documentation.
TAX	<ul style="list-style-type: none"> ● Policy: UK will regain the freedom to determine its own tax policy in the areas subject to EU law, such as those highlighted below. ● VAT: VAT is a European tax but implemented by domestic law. UK will be free to decide whether to repeal, amend or retain existing VAT legislation. If repealed, likely to be replaced by another form of sales tax as VAT represented 22% of annual tax revenue in 2014/15. ● Customs duty: Customs duty (currently imposed directly by the EU Customs Duties Regulation) will fall away, requiring UK to introduce its own customs duties and enter into a customs agreement with rEU. ● Barriers to trade etc: There are a number of EU direct tax directives implemented into domestic law which remove tax barriers to trade, e.g. dividend withholding tax between group companies under the Parent Subsidiary Directive, which will be subject to review. However, UK companies may lose withholding tax protections where not covered by double tax treaties. ● Other potential changes: UK will have freedom to: <ul style="list-style-type: none"> - simplify areas of the UK tax code e.g. controlled foreign company rules; - give tax breaks for specific industries without having to satisfy the requirements of the EU state aid rules (see below); and - charge capital duty on issue of shares and SDRT on transfers of shares into clearance services (currently prohibited by Capital Duties Directive).
FINANCE/ RESTRUCTURING AND INSOLVENCY	<ul style="list-style-type: none"> ● Insolvency Regulation: Increased risk of competing insolvency proceedings in rEU as a result of loss of rule requiring EU recognition of UK insolvency proceedings. Increased uncertainty for English insolvency practitioners seeking the assistance of courts in rEU. ● Mutual recognition: Loss of automatic EU recognition of UK judgments. This could

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	<p>make the English law scheme of arrangement procedure a less attractive restructuring option for overseas companies in rEU.</p> <ul style="list-style-type: none"> ● Financial Collateral Directive: UK Regulations implementing the Financial Collateral Directive will remain valid but the recognition of English law financial collateral arrangements elsewhere in the EU will be uncertain. ● Currency risk: Risk of intense currency fluctuations, making it more difficult for parties to meet unhedged payment obligations denominated in other currencies (and in an extreme scenario, resulting in capital controls).
<p>EMPLOYMENT LAW/EMPLOYEE INCENTIVES</p>	<ul style="list-style-type: none"> ● What will be kept: Many employment rights which derive from EU legislation have been enacted in domestic legislation so will likely remain, such as discrimination and family-friendly employment rights. ● Works councils etc: Scope for reform in some areas considered unduly burdensome on business, such as works councils and collective consultation obligations (subject to agreement with Trade Unions which may be politically difficult). ● Working time etc: Opportunity to reform regimes perceived to lack certainty and create unnecessary burdens and costs for business, such as working time, holiday pay and equal treatment for agency workers. ● Immigration: Depends on the UK's post-Brexit relationship with the EU but “full” Brexit would involve freedom of movement restrictions – EU nationals may be subject to the same visa restrictions as non-EU nationals. ● Employee share offers: Potential impact on employee share offers if current exemptions under Prospectus Rules cease to apply (subject to grandfathering).
<p>PENSIONS</p>	<ul style="list-style-type: none"> ● Economic effects: The most immediate implications for pension schemes (and sponsoring employers of defined benefit schemes) are in relation to the economic effects of Brexit on their asset and liability values. ● Employer covenant: The strength of the employer covenant could also be affected: this informs decisions about funding and investment in defined benefit schemes. ● Scope for change: A good deal of UK pensions law derives from Europe, including legislation on equality, scheme funding, the Pension Protection Fund and other member protections. The treaty and directive requirements have been transposed into national legislation, so they will not cease to apply on Brexit. Repeals are unlikely but there could be some amendments to ease pressures on employers. Many existing EU laws are likely to continue to be applied, and if the UK remains an EEA member some new ones too. ● New pensions directive: A draft new pensions directive might impose more stringent scheme funding requirements, though the latest draft omitted such provisions. The UK government opposes any new requirements but might be required to implement the directive before Brexit is completed. The same directive would facilitate cross-border pension provision; Brexit will make it more difficult. ● Tax treatment: The tax treatment of pension contributions, investment returns and benefits would not be affected. HMRC may find it easier to allow employers to reclaim VAT paid on their scheme’s investment management fees.
<p>DISPUTES</p>	<ul style="list-style-type: none"> ● Governing law: The UK courts may either leave the Rome I and II rules on conflict of laws in place, or revert to the pre-Rome I and II regime over time. A choice of English governing law will be respected by courts in rEU as they will continue to apply Rome I and II. ● Jurisdiction: It is uncertain how rEU courts will approach contracts conferring jurisdiction on English courts, where a counterparty is rEU resident. ● Parallel proceedings etc: No bar on parallel proceedings, but English courts regain ability to obtain anti-suit injunctions in relation to rEU proceedings. ● Service and enforcement: Service of English proceedings and enforcement of judgments in rEU are both likely to be less straightforward; judgments of CJEU will no longer be binding in UK.

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INTELLECTUAL PROPERTY	<ul style="list-style-type: none"> ● EU-wide IP rights: all pan-EU intellectual property ("IP") rights may cease to apply in the UK (such as the Community Trade Mark or "CTM"); this would leave only the UK national rights or reciprocal rights granted by UK law pursuant to international treaty obligations, and could require businesses to re-apply for protection of their IP. In practice, it is likely that the UK will legislate to preserve these rights as far as possible under any post-Brexit relationship. ● EU-wide enforcement: All pan-EU court orders issued by a UK court against IP infringers may cease to apply in the EU, and the UK courts may regard pan-EU orders issued by rEU courts as no longer applying in the UK; similarly rEU enforcement and remedies may become more difficult.
DATA PROTECTION, IT AND E-COMMERCE	<ul style="list-style-type: none"> ● IT contracts and e-commerce: The considerations listed in the contract and commercial law sections above would apply. Other potential areas of change include the application of TUPE to IT outsourcings and the ability to move data between different European operations. ● Data protection: UK will be free to diverge from EU data protection law but may conclude that it is preferable not to do so. In particular, if the UK does not remain part of the EEA, it is unclear whether it would be regarded as a 'safe' destination for data transferred out of the EEA; this would be subject to an 'adequacy decision' of the European Commission, which would in turn require the UK to retain a framework of law close to the EU regime. ● Reform of EU data protection law: The General Data Protection Regulation ("GDPR"), which will significantly change EU law, is likely to come into effect during 2018; Brexit negotiations will take place during the 2 year transition period of the GDPR, so businesses will face a difficult choice about whether to delay significant compliance projects.
REAL ESTATE	<ul style="list-style-type: none"> ● Effect of uncertainty: likely to impact operational decisions, such as office moves/major acquisitions or disposals. ● "Safe" haven effect: In the event of market instability, UK real estate market could benefit from overseas investment looking for a "safe" haven. ● London real estate: London real estate likely to remain an attractive quality asset. Investors may well be attracted to low risk prime real estate in post-Brexit period of adjustment. ● Medium term impact: In the medium term, negative economic effects of Brexit may result in reduced rents and letting activity e.g. potentially as a result of large financial institutions and multinationals deciding to relocate some of their operations to rEU.
STATE AID AND PUBLIC PROCUREMENT	<ul style="list-style-type: none"> ● State aid: The UK will have greater freedom to provide subsidies or other forms of state aid to UK businesses - but the ability of the UK government and businesses to complain about state aid in rEU Member States will be diminished. ● Public procurement: The UK will be likely to retain some rules on tendering of contracts between the public sector and business but will be free to adopt a more flexible approach and could choose to discriminate in favour of UK suppliers. However, UK businesses will lose the rights they currently enjoy when tendering for public contracts in EU Member States (e.g. to complain about discrimination, unequal treatment etc).

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