

Linklaters

FAQs on the impact of the UK's vote to leave the EU



The UK has voted to leave the European Union, marking the beginning of a journey whose destination is uncertain.

Negotiations with the 27 other member states will be required to agree terms of withdrawal and settle the UK's future relationship with the EU. At the same time, the UK will have to decide how to disentangle its domestic laws from EU law.

At this stage, it is impossible to tell what kind of agreement will be reached between the EU and the UK. This means that key questions such as whether businesses based in the UK will still be able to benefit from the freedom to provide services across the EU and, in particular, the "passporting" regime for financial services cannot be answered. Although the likely impact on the financial services sector is particularly important for the UK economy, in this publication we answer some key legal questions posed by the vote to leave that are relevant to businesses across all sectors.

Please feel free to contact us to discuss any of the points raised below, or any sector-specific issues.

Withdrawal process

1 The UK has voted to leave. So what happens now?

To initiate the process of withdrawing from the EU, the UK must give formal notice to the European Council of its wish to withdraw. There is no set deadline by which the UK has to serve this notice.

The process for a member state to withdraw is dealt with, in fairly short form, in Article 50 of the Treaty on European Union. Under Article 50, a withdrawal agreement between the UK and the EU will need to be approved by the European Council, acting by a qualified majority (i.e. 72%, or 20 out of 27, of the member states representing 65% of the total EU population). The European Parliament, acting by a simple majority, will also need to approve the deal.

The UK will remain a member of the EU, and EU rules will therefore continue to apply to it, until conclusion of the withdrawal agreement. However, if there is no agreement within two years after the formal notification, the Treaty rights and obligations will automatically cease to apply, meaning that the UK could leave the EU without an agreement having been concluded. This two year period can be extended – but only by the unanimous consent of all member states.

Movement of people/workers

2 Will there be restrictions on the free movement of workers and visitors between the EU and the UK?

Absent any agreement to the contrary with the EU, from the time the UK leaves the EU, it will no longer benefit from the EU's fundamental freedoms such as free movement of people and free movement of workers. Instead, national laws on immigration will apply and therefore visitors' visas and work permits may be required for UK nationals visiting/working in the EU and vice versa.

If the UK were to remain in the European Economic Area (EEA) (the Norwegian model) or if it enters into a bilateral trade agreement with the EU and European Free Trade Association (EFTA) membership (the Swiss model), the right to free movement is likely to be preserved. A UK-EU free trade agreement may result in the EU allowing the UK free access to the single market, in return for a form of right of free movement.

If the UK's exit takes a form similar to a customs union, (as Turkey has with the EU), or if the UK's future relationship with the EU is to be based on World Trade Organisation (WTO) rules, the reciprocal right to free movement is likely to disappear.

Imports and exports

3 What happens to imports and exports? Will tariffs be applied?

If the UK leaves the EU without first securing an agreement on a new relationship, UK trade relationships with the EU would be governed by WTO rules. Under those rules, EU member states would be obliged to charge tariffs on UK goods at the rates agreed for WTO members that do not have a preferential scheme or trade agreement in place with the EU. If the EU were to waive those rates for the UK (which it can), it would also have to waive them, for the same products, for other countries.

The UK would also have to charge WTO rates on goods the UK imports from the EU. Again, it could waive tariffs on imports from the EU but if it did, under WTO rules it would also be obliged to waive the same tariffs for those products for all other countries in the world with which it does not have a trade agreement. If the UK unilaterally waives the tariffs for these other countries exporting to the UK, it would lose important bargaining power to negotiate trade agreements with those countries.

4 If our business complies with EU standards, will we now need to comply with EU and UK standards? Will the UK have any say in those EU standards?

Businesses need to comply with the standards of any country into which they sell a product or service. If UK standards start to diverge from EU ones as a result of future changes either in EU law which are not followed by the UK or vice versa, any business supplying to both the UK and the EU will have two sets of standards to follow, as will any EU business supplying to the UK and EU. When the UK is no longer a member of the EU, it will cease to have any say on what those EU standards are.

Data transfer

5 Will we continue to be able to transfer data between our UK offices and those based in the EU?

European data protection law contains a restriction on the transfer of personal data to non-EEA countries that the EU considers do not provide an adequate level of protection. The UK might seek a finding that it provides adequate protection as part of the exit negotiations on the basis that it has already implemented EU law.

However, an adequacy finding may be difficult following the EU Court of Justice's decision in *Schrems*. The decision suggests that a country does not provide adequate protection unless its data protection laws are essentially equivalent to those in the EU and its government does not carry out mass and indiscriminate surveillance of its citizens. It is not clear if the UK's current and proposed surveillance regime falls foul of this standard. Similarly, an adequacy finding is unlikely unless the UK implements the enhanced requirements of the EU's General Data Protection Regulation. If the UK does not obtain an adequacy finding, the transfer of personal data from the EU to the UK would be subject to additional restrictions once it leaves the EU. It may be possible to overcome these restrictions through other mechanisms. For example, it may be possible to rely on the so-called EU Model Contracts. However, the validity of Model Contracts is in doubt following a second reference to the EU Court of Justice in *Schrems*. If Model Contracts are found to be invalid, then transferring personal data out of the EU will become difficult.

It is difficult to provide any firm recommendations at this time. However, businesses that receive personal data from the EU should anticipate that they will need to implement additional compliance measures in due course (such as entering into Model Contracts). In extreme cases, they may want to consider relocating some of their data centres to the EU.

Intellectual property

6 What happens to any pan-EU intellectual property rights?

Pan-EU unitary rights such as the European Union Trade Mark and Community Registered Design (and Unregistered Community Design) will cease to apply in the UK when it leaves the EU unless special arrangements are agreed – for example, transitional arrangements whereby pan-EU IP rights in effect at the date of a UK exit either continue to apply or otherwise can be converted into national rights. In any event, businesses that require pan-EU IP rights going forward will likely have to acquire and enforce separate national IP rights in the UK.

For further detail on the IP implications of a UK withdrawal from the EU, see the Article by Linklaters partner, Ian Karet, published in the Journal of Intellectual Property Law and Practice: *“Brexit – more downside than up”*.

Tax

7 Will VAT rules be changed by the UK government?

The UK's VAT legislation will (at least initially) remain, but the tie between this and the underlying EU law will cease. This means that aspects of the UK's VAT rules may be interpreted differently and the UK government will be free to amend (or repeal) the VAT rules as it wishes. Over time, the divergence could become significant.

On leaving, the UK will also become a non-EU member state for the purposes of assessing whether the rules on intra-EU supplies apply.

8 Are there likely to be any other tax changes?

Most UK tax policies are not driven by the EU; however, there are some areas where the UK has had to make changes to its tax rules to comply with EU law. The UK government could, if it wished, reinstate the aspects of previous rules which were amended or repealed to avoid non-compliance with EU law, for example the UK's rules on transfer pricing, controlled foreign companies, transfers of assets abroad, group and consortium relief and dividend taxation.

In other areas there are rules on the UK statute book which are inconsistent with EU law but were never repealed by the UK. Instead, whilst the UK remains a member of the EU, the legislation is required to be read in conformity with EU law or disapplied as necessary. However, once the UK exits the EU, there may well be uncertainty as it could be that exit would have the effect of automatically “reinstating” the non-compliant aspects.

There are also a handful of EU Directives relating to direct tax. Whilst the significance of these in the UK is relatively limited, the UK leaving the EU could affect how payments between the UK and EU member states are taxed in the EU member states in question. For example, it could result in dividends to a UK company from a subsidiary in an EU member state being subject to withholding tax where this would not previously have been the case.

EU funding

9 If our business received a grant or other funding from the EU, what will happen to it?

This will depend on the type of grant, the terms of the grant and anything agreed between the UK and the EU. Recipients of grants should consider the terms (including whether they can draw down funds before exit) and seek to ensure that the UK government would provide replacement funding after exit.

Competition law including state aid and public procurement

10 Will there be any impact on competition law approvals and/or investigations?

Large cross-border mergers will no longer benefit from the EU's "one-stop-shop" system of review. As a result, mergers could require approval by both the European Commission and the UK Competition & Markets Authority, with implications for businesses in terms of the time, expense and regulatory uncertainty involved in achieving clearance.

In the interim period following the vote and prior to the UK actually leaving the EU, it will be interesting to see how the UK government will deal with big-ticket M&A transactions subject to review by the European Commission under the EU Merger Regulation. Will the UK accept the Commission's jurisdiction to rule on those cases, or will it seek to review those mergers under its national rules, or at least exercise additional scrutiny under the existing referral mechanisms?

In relation to cross-border anti-competitive conduct, such as cartels and abuse of dominance, after the UK leaves the EU, businesses will be subject to separate enforcement measures by the European Commission and the UK Competition & Markets Authority, potentially resulting in the imposition of fines or other restrictions on their conduct by both authorities for the same behaviour.

In addition, in the context of competition investigations, it is not clear whether legal privilege will apply to legal advice given by UK qualified lawyers which falls into the hands of the European Commission. Communications with UK-qualified lawyers (unless also qualified elsewhere in the EEA) may not be protected from seizure outside the UK.

11 Will the UK government be free to give state aid?

Rules constraining the use of state aid apply to all members of the EU. Their purpose is to prevent governments from giving advantages to businesses in a way which could distort competition. This enables businesses in one member state to compete on a level playing field with competitors in other EU countries.

Absent any other agreement, the UK would no longer be bound by the EU's rules on state aid, meaning that it would have the flexibility to support "national champions". In the interim period ahead of leaving the EU, this raises the question of whether the UK will continue to faithfully abide by the state aid rules.

However, both the EEA agreement (the Norwegian model) and the EFTA agreement (the Swiss model) contain prohibitions against state aid, so if the UK's exit model followed either of those routes, it would be bound by the existing rules. Even if the UK did not adopt any of those models, WTO rules would apply and they also prohibit certain types of state subsidy. So the reality is that, even if the UK wished to grant state aid (and to date it has not been a big proponent of this), its ability to do so would likely remain restricted. However, absent an EEA- or EFTA-type trading arrangement, UK businesses would face losing the protection they currently enjoy against anti-competitive aid given to their competitors, as regards exports to the UK, for example.

12 Will the EU rules on public procurement continue to apply in the UK?

Once it leaves the EU, the UK would no longer need to comply with the EU's public procurement rules and could in theory select UK bidders to a greater extent. However, as a non-EU country, the UK may find it difficult to complain about public procurement rules being applied "unfairly" against UK companies tendering for EU work. Ultimately, irrespective of any trading relationship that is negotiated with the EU, it is likely that the UK would have rules similar to the existing public procurement regime.

Legal/regulatory considerations

13 What will happen to EU-derived law currently being applied in the UK?

EU-derived law applies in the UK through a number of routes and the impact of withdrawal will differ depending on the type of law and, where relevant, how it has been implemented in the UK. There are two broad categories: (1) those which are directly effective such as regulations and (2) those, typically directives, which have had to be implemented within the UK by UK legislation.

The former would cease to have effect at the point at which the UK withdraws/the Treaty obligations cease to have effect under Article 50.

In relation to the second category, many of the EU directives have been implemented in the UK by powers conferred on ministers under the European Communities Act 1972 (ECA 1972). In principle, if the ECA 1972 is repealed by the UK Parliament, any legislation made under it would also be deemed to be repealed, unless a specific saving provision is made.

However, not all EU laws have been implemented under the ECA 1972. Some have been implemented by Acts of Parliament or through other measures. The repeal of the ECA 1972 would not of itself affect these provisions so they would stay in force.

Given the wide reach of EU-derived legislation and the complexities of unpicking it, it will be very difficult for the UK to fully determine what legislation it wants to keep/repeal/amend by the time it withdraws. In many areas there is no particular reason to suppose that there would be a policy desire to make significant changes to domestic law as a result of Brexit. See, for example, our employment law analysis: *"Bonfire" of workers' rights – is it likely?*

Therefore it is likely that the UK government will need to pass some kind of continuity order or savings provision keeping all or the majority of legislation in place, so far as practicable, until it is specifically repealed or amended. However, this is still likely to raise a large number of technical and interpretive issues, particularly on questions such as transitional arrangements, replacement of references to EU institutions and the scope of application of EU Court of Justice decisions. Additional complexities might arise in areas, such as environmental law, which have been devolved (to the Scottish, Welsh and/or Northern Irish administrations), since it would not normally be within the scope of the UK (Westminster) parliament to legislate in these areas.

14 What happens to the regulatory institutions of the EU?

The powers of EU institutions would, barring any agreement to the contrary between the UK and the EU, fall away, so far as the UK is concerned, upon the UK exiting. This means that by the time of withdrawal, the UK will need to have in place its own alternatives to fill the roles of European bodies such as the European Securities and Markets Authority (ESMA), the European Banking Authority (EBA) and the European Medicines Agency (EMA).

15 Would a court judgment granted by the English courts be recognised by courts in an EU member state? And vice versa?

Within the EU, enforcement of judgments of courts of one member state in another member state is facilitated by an EU Regulation (the “Brussels I Recast”). This will cease to apply as regards the UK when the UK leaves the EU. Whether anything will remain in place between the UK and the EU would be a matter for the UK’s withdrawal negotiations. In that context, there are possibilities which would see little change. Assuming, however, a “worst-case” scenario where nothing is left to fill the gap, then the enforcement of an English court judgment by courts in the EU would become a matter for national law, which will vary and local law advice would therefore be required. Judgments from the courts of a member state would be enforceable in England under English common law rules. This would be procedurally more cumbersome than under the current EU regime but otherwise there would likely be little practical impact.

16 What about jurisdiction clauses in favour of the English courts?

Subject to limited exceptions, EU legislation, principally the Brussels I Recast, gives effect to an agreement giving the English courts jurisdiction and requires any non-chosen EU court to decline jurisdiction (if the clause is exclusive). What happens to this legislative regime after the UK leaves the EU remains to be seen and there may be little change. But, assuming the “worst-case” scenario, the English courts would, under English common law, accept jurisdiction on the basis of the parties’ choice. However, whether a non-chosen EU court would decline jurisdiction in favour of the English courts (as a third-party non-EU state) would be more complex and subject to greater inconsistency. This may be off-set by more freedom for the English courts to protect their jurisdiction, principally by way of anti-suit injunction.

17 Would a choice of English law continue to be given effect before the English courts and the courts of an EU member state?

The English courts are obliged by two EU Regulations (Rome 1 and Rome 2, in relation to contractual and non-contractual obligations respectively) to give effect to the parties’ choice of law (subject to limited exceptions). If this legislation (or any equivalent) does not continue under UK law after the UK exits the EU, the efficacy of the parties’ choice of law would largely remain. The English courts would, under English common law, uphold the parties’ choice in relation to contractual matters. Although the position in relation to non-contractual matters is largely untested, the English courts would also be likely to uphold the parties’ choice. EU courts would continue to apply Rome 1 and Rome 2, and so would continue to recognise the parties’ choice of English law.

18 What about arbitration?

A choice of London seated arbitration and related matters under any such arbitration clause would be unaffected by the UK leaving the EU as arbitration law is regulated by national law (the UK’s Arbitration Act 1996) and non-EU international instruments (the New York Convention). An arbitral award made in the UK should be recognised and be enforceable in EU member states, and vice versa, on this basis.

We hope that this has been of help as you start to consider the way ahead. If you have further questions or would like to discuss any of the issues covered in this publication, please do not hesitate to contact either your usual Linklaters contact or any of the persons named in our key contact list provided separately.

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