

Key Implications of Brexit

A practical guide to the potential impact of a no deal Brexit.

For a more in-depth analysis of the possible effects of Brexit on business and how Walker Morris can help, please visit our dedicated webpage: www.walkermorris.co.uk/publications/brexit

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*The government has
launched a website for
businesses to prepare for
EU Exit.*

<https://euexitbusiness.campaign.gov.uk/>

Commercial

- Some commercial contracts may benefit from the inclusion of a so-called “Brexit clause” to cover the situation where a contract becomes commercially unviable as a result of Brexit, and which allows parties the option to renegotiate or terminate for a Brexit-related event. However, in the absence of a Brexit clause, force majeure or hardship clauses and, in particular, a well drafted pricing clause, could afford some protection and these should be considered/reviewed first.
- Without access to the single market, movement of goods between the UK and EU may become subject to new tariffs and taxes. Contracts should be reviewed to see who bears responsibility for these and to see whether there is flexibility built in to pricing mechanisms to address this. Supply chains should also be reviewed to take into account potential disruption and delays at ports of entry and exit to the UK (with Channel Ports anticipated to be impacted significantly).
- It is worth considering how territories are defined (e.g. in an exclusive licence or distributorship agreement) and how such clauses will operate when the UK is no longer part of the EU or the EEA.
- Businesses in particular sectors - food and hospitality, for example - will be adversely impacted by the ending of the free movement of labour from Eastern Europe to the UK. (See further the section on Employment & Immigration).
- Contracts dealing with sectors or products subject to specific regulatory regimes or approvals should be given particular attention to consider the likelihood of divergence in regulation post-Brexit. This may ultimately require products to meet different regulatory requirements in the UK than in the EU. (See https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/767811/Partnership_pack_prepare_for_no_deal_changes_at_border_Third_edition_.pdf).
- GDPR is also not going away and will remain important; the UK is committed to maintaining high data protection standards and the Government has clarified that GDPR will be absorbed into UK law when we exit the EU and so there will be no substantive changes to the rules. If the UK leaves the EU with no agreement in place for the continued flow of personal data, organisations involved in personal data transfers to and from the European Economic Area will need to give careful thought to alternative data transfer mechanisms, such as standard contractual clauses. While the Government intends to allow data to flow from the UK to the EEA, transfers from the EEA into the UK will be affected. As a starting point, the Information Commissioner’s Office has published a range of guidance and resources. (See <https://ico.org.uk/for-organisations/data-protection-and-brexit/>)

We surveyed in-house lawyers at our events and found that:

69% of in-house lawyers think Brexit is a key risk but only a third have a strategy for managing that risk.

Competition

- EU competition rules will continue to apply until the UK formally leaves the EU. Post Brexit, the competition rules will not change materially as the UK operates similar rules under domestic legislation, which will continue to apply. Over time, these rules and decision-making by the UK authorities may diverge from the position in the EU.
- Currently, mergers which meet the UK and EU Merger Regulation notification thresholds benefit from the EU “one-stop-shop” principle and need only be notified to the European Commission. The UK will fall outside this regime post-Brexit and both EU and UK notifications will be required for transactions caught by both merger regimes.
- Businesses should also expect an increase in the number of parallel investigations at EU and UK level for competition law infringements with pan-European effects.
- Brexit may affect the ability of UK businesses to bring follow-on damages claims in the UK in reliance on an EU infringement decision.
- The UK’s Competition and Markets Authority (CMA) will enforce state aid rules in the UK post Brexit. (See further the section on Energy Infrastructure and Government).
- The Competition (Amendment etc.) (EU Exit) Regulations 2019 will apply in the event of a no deal Brexit, retaining the benefit in the UK of various EU block exemption regulations, amending UK legislation to remove reference to EU Competition law and making transitional provisions. In particular, a new Section 60A inserted into the Competition Act 1998 will allow the UK Courts and Regulators to depart from pre-exit EU competition case law where appropriate in specified circumstances.

Avoid discussing with competitors the detailed implications of Brexit for your business. Keep any discussions high level and ideally obtain competition law guidance first.

Consumer

- There is a considerable body of UK consumer legislation which implements EU law and generally the UK is viewed as having a strong consumer protection regime. Over time, post-Brexit, if domestic law diverges from the EU complaint standard of today, there is the possibility that UK businesses selling to UK and EU consumers may face parallel regimes.
- The rising cost of inputs may mean businesses are tempted to pass costs on to consumers. Apart from the commercial aspects of such a decision, existing contracts and T&Cs should be reviewed to check what level of flexibility there is. Any such review should have regard to the Consumer Rights Act 2015 and the Consumer Protection from Unfair Trading Regulations 2008.
- EU Directives that have already been implemented into UK law, for example the EU Online Dispute Resolution Regulation (which requires online retailers to link to the central EU online dispute resolution portal) should not immediately be affected by Brexit. However, it is anticipated that if current legislation becomes no longer fit for purpose, adequate replacements will need be enacted.
- EU consumers currently have the right to take action against traders in their local courts. Any change to this as legislation develops over time post-Brexit may be keenly felt by consumers.
- Post-Brexit, businesses currently trading on pan-European terms may need to move to two sets of T&Cs - one for the UK and one for the EU.

Intellectual Property

- The decision to leave the EU did not have an immediate impact on registered EU rights; EU trade marks and community designs remain valid and subsisting in the UK. However, registered EU trade marks and community designs will cease to have effect in their current form in the UK post Brexit.
- Regardless of whether a deal is reached, the government has indicated that it will ensure existing registered EU trade marks and Community designs will continue to be protected and enforceable in the UK. It is envisaged that rights holders will be granted an equivalent UK registered right which will come into force post Brexit.
- However, any pending EU trade mark applications or Community design applications will not be granted a cloned right and it will be necessary to re-file in the UK to obtain an equivalent right. Where it is necessary to re-file in the UK, it is anticipated that rights holders will be granted a 9 month period from exit to re-file in the UK in order to benefit from the filing date of the EU trade mark application or Community design.
- Contractual agreements such as licences and co-existence agreements should be reviewed to ensure they continue to apply to the UK.
- Pan-EU injunctions that have been obtained may not be effective any longer to protect IP rights in the UK. Businesses are likely to need to seek separate UK and EU injunctions to protect their IP rights.
- The UK is a member of international treaties relating to copyright which will ensure that the protection of copyright works in the UK and for UK copyright works overseas will remain relatively unchanged. However, certain UK-EU cross-border functions of copyright will cease to apply to the UK post Brexit.

Patents will be less affected than trade marks and designs as the European Patent Office (EPO) is not in fact an EU institution. A patent granted by the EPO which is currently effective in the UK will therefore continue to be so post Brexit.

Corporate

- There is no reason to suppose that there will be any significant change in M&A processes, the Takeover Code, deal structures or in administrative / company secretarial functions.
- Due diligence will need to be undertaken with reference to Brexit. For example, does the target business rely on cheaper labour from Eastern Europe; how would it be affected by the imposition of tariffs; do existing pricing/currency clauses provide adequate protection?
- Volatility in interest rates/exchange rates could create a risk of a breach of financial covenants in some financing agreements and financing agreements should also be reviewed for any Material Adverse Change (MAC) clauses that could be triggered by Brexit.
- The issue of “prospectus passporting” will need to be resolved. EU arrangements currently allow EU-based issuers of debt or equity securities to issue a prospectus throughout the EU once it has been approved in a single member state. This will cease to apply once the UK leaves the EU in a no deal scenario.



Banking

- Firms may have to consider relocating part of their UK operations to the EU or setting up UK subsidiaries.
- On balance, our view is that English law is likely to remain the law of choice for lending documentation involving cross-border financing due to the certainty afforded to lenders by English law and the volume of experience and expertise in financing matters which lawyers practising English law and financiers who predominantly use English law have built up.
- There was some initial evidence of a slowdown both in the commercial property sector and in investment activity generally following the vote to leave. Although deal activity had largely recovered up to the end of last year, the recent hiatus would seem to have put a marked slowdown on new transactions coming forward as businesses await the outcome of Parliament's deliberations. Depending on the outcome of Brexit negotiations, there must be a risk of investors retreating from the UK with an obvious impact on deal activity generally, although (as a counter-balance) some opportunistic investors may well take advantage of currency movements to seek to buy sterling assets more cheaply.
- We expect a no deal Brexit will have little immediate impact on residential mortgage lenders as they tend to lend to UK borrowers against UK properties. It should therefore remain business as usual.
- Lenders will be pleased that their investment and hard work in ensuring compliance with the Mortgage Credit Directive Order 2015 ("MCDO") will not have been wasted as the Government intends to pass regulations to cover any issues that arise from implementation of the MCDO once we leave the EU. We expect any such issues that may arise and need to be remedied will be those that have a European flavour and were ones that the MCDO attempted to regularise. For example, the making of buy to let loans against EU (non-UK) based properties and loans made to EU borrowers.

Restructuring / Insolvency

- Cross-border insolvency and restructuring within the EU is governed by the Recast Regulation on Insolvency (EU) 2015/848. If the UK leaves the EU without a deal on 30 March the Recast Regulation on Insolvency will no longer apply, and the draft Insolvency (Amendment) (EU Exit) Regulations 2018 will take effect. The draft regulations attempt to address the deficiencies which will arise from the absence of mutual application of the Recast Regulation on Insolvency and make consequential amendments (effective from exit day) to legislation.
- After a no-deal Brexit, any insolvency proceedings opened in the UK would no longer benefit from automatic recognition in other EU Member States and insolvency proceedings opened in EU Member States would no longer benefit from automatic recognition in the UK. A UK insolvency practitioner who is appointed as the administrator of a company with cross-border operations may have to initiate insolvency proceedings in all of the other countries where the company has staff, subsidiaries, or other assets.

We surveyed in-house lawyers at our events and found that:



of in-house lawyers aren't yet sure of the risks and impacts of Brexit.

Employment and immigration

- There will be significant changes to immigration rules and requirements for EU nationals over the next few years. The position is likely to differ depending on when the EU national arrives (or arrived) in the UK:
- **Those who arrive by the exit date (currently 29 March 2019):** The Government has indicated that the planned “settled status” scheme (due to be fully open on 30 March 2019) will be open for EU nationals who arrive in the UK before the exit date. Such individuals will make an application for settled status (if they have five years of continuous residency) or pre-settled status (if they have less than five years of continuous residency). They will have a period of time to make the application – likely until 31 December 2020.
- **Those who arrive after the exit date:** The Government has indicated that a new immigration system will be implemented from 1 January 2021 (i.e. after what would have been the “transition period” under the draft withdrawal agreement). It is therefore not clear on what basis EU nationals arriving after the exit date, but before the new system is implemented, will be able to enter and remain in the UK. The Government has indicated that EU identity cards will remain valid for travel until the new immigration system is in place – it is therefore likely that freedom of movement will effectively continue (in respect of EU nationals coming to the UK, but not necessarily vice versa) until the end of what would have been the transition period (31 December 2020). New immigration rules will then apply to EU nationals from 1 January 2021– we do not know what these will be at present, but there are likely to be some similarities to the current UK Points Based System applicable to non-EU nationals.
- Most employment laws derived from EU law are expected to be converted into UK law on the exit date – as such, there will be no immediate fundamental changes to workers’ current employment rights. Only rights on an employer’s insolvency and in respect of new European Works Councils are expected to change on the exit date.
- The UK will have greater freedom to change employment laws following the exit, although it is unlikely that substantive changes will be made (at least in the short term) because: (i) there is unlikely to be much political support to significantly alter existing employment rights; (ii) UK law already incorporated many employment rights before they were made EU law; (iii) much EU derived employment law is regarded as a good thing by both employers and employees; and (iv) any future trade agreement with the EU is likely to involve adherence to a certain amount of EU employment rights.
- We have already seen certain businesses scaling back UK operations and/or moving their head offices to Europe – this is likely to continue and will result in an increase in reorganisations and redundancies.
- Brexit has undoubtedly led to an upsurge in racial and religious abuse and attacks in the UK. Employers may find this reflected in an increase in incidents of racial/religious harassment and abuse at work. Employers will need to be fully equipped to intervene, manage and take steps to prevent such incidents.

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Employment hits a new record high of 75.7%.

- Office for National Statistics
August to October 2018

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Pensions

- In defined contribution schemes, any economic downturn resulting from a “no-deal” Brexit is more than likely to impact directly the value of a member’s benefits. In contrast, in terms of defined benefit pension schemes, it is employers who will be affected: they, rather than the members, are responsible for eliminating any resulting funding deficit.
- Most pensions law in the UK, including automatic enrolment and the regulatory and funding regime for defined benefit schemes, is set out in UK-specific legislation, even where it is derived from EU law. Pension schemes will therefore see a limited legal impact from a “no-deal” Brexit.
- The European Union (Withdrawal) Act 2018 addresses the “no deal scenario” and incorporates all of EU law on a snapshot basis on 28 March 2019. The Government has published regulations due to come into force on 29 March 2019 to deal with the pensions implications of a no deal Brexit. Many of the changes made by these regulations are technical and are designed to confirm that UK pension schemes may still invest in both UK and EU investment markets.
- In addition, the regulations repeal the EU cross border pension scheme requirements which means that this small group of schemes will no longer need to be fully funded at all times. The Regulator intends to provide guidance on how these schemes should operate. In the event of a “no-deal” Brexit, though, the regulation and operation of these schemes, which are mainly between the UK and the Republic of Ireland, would also depend on any agreement between the UK and the relevant EU member state.
- Whilst the Government has said that it intends to protect employment rights, this may not extend to retaining the protection of Beckmann enhanced redundancy and early retirement rights following TUPE transfers in the defined benefit pension scheme context. For now, though, there is no proposal to remove this protection from the TUPE Regulations.

Tax

- Under a no deal Brexit, the import/ export landscape would become more administratively burdensome. For example, UK digital services businesses would no longer benefit from the EU-wide MOSS system (which currently negates the need for businesses to separately register in each of the EU member states.)
- Companies may need to withhold tax on payments of interest, royalties and dividends intra-group. The EU directives which currently eliminate withholding taxes would no longer apply, and UK businesses would need to rely on the double tax treaty for each country in question, some of which do not eliminate the obligation to withhold tax.
- Businesses importing goods from the EU would be required to follow customs procedures in the same way that they currently do when importing goods from a country outside the EU. This would include import declarations, customs checks and payment of any customs duties.

We surveyed in-house lawyers at our events and found that in terms of both likelihood and impact, cyber breach, Brexit and increasing regulations are perceived as the biggest risks.

Real Estate

- The Bank of England's forecasts in the event of a no-deal Brexit will not make happy reading for UK commercial property owners. Other analysis is more optimistic but it seems to be generally accepted amongst property experts that a no-deal Brexit will lead to a drop in values.
- Whilst it is unlikely many existing business will relocate away from London, a no-deal Brexit may lead to a loss of new business expansions and new service offers. Generally London is likely to see greater competition from other global financial venues.
- There is widespread concern many retailers are under-prepared for a no-deal Brexit and this is likely to lead to further difficulties for an already troubled high street.
- The current 'wait and see' culture amongst investors is likely to continue until the UK's future relationship with Europe becomes clear.
- Some investors, particularly overseas investors, are taking advantage of the financial uncertainty, with an increased opportunity to negotiate reduced price / rent on UK properties and to benefit from favourable exchange rates due to the weakened sterling. Furthermore, some see this is an opportunity for growth in the North, as developers are likely to be more inclined to push through perceived 'safer' and cheaper developments which require a smaller initial financial commitment.

Construction

- The effect on the supply of labour: Concerns remain, in the short-term at least, about labour shortages and/or increased labour costs. Long term, it has been suggested that there could be a positive impact of training an indigenous workforce but that does not assist with the current position. There is for example real concern around the suggestions that limits could be placed on migration of lower skilled workers. Steps can be taken to try to protect rights of workforce currently living in the UK (as per the Employment section of this note).
- Supply costs: It is unknown how any deal or lack thereof will impact on supply costs but various concerns abound in relation to potential tariffs, taxes, exchange rate fluctuations and appropriate standards. In terms of new contracts, consideration should be given to relatively standard requirements to meet "all applicable laws and regulations". There could be a cost as well as potential delays associated with any change in obligations arising. Without amendment, this would usually protect the customer. However, if acting as supplier, a "change in law" clause could be adopted to protect against such unknown costs and to allow for extensions of time associated with such changes.
- Currency fluctuations: In terms of currency fluctuations, where industry margins are notoriously tight there is scope to look to include exchange rate clauses in contracts.
- Building Standards: Much EU regulation is already incorporated in UK Building Standards. Even if the UK were to fall back on WTO rules in a no deal situation, there would be the ongoing need to meet European standards for the purposes of dealing with the EU as a third party trading partner. There is no guarantee that the EU will accept quality tests approved to UK Standards (even if these are asserted to be commensurate with European standards) in a no deal situation. Again (as referred to at item 2 above), consideration should be given to inserting change in law clauses to deal with the cost and associated delay of any additional testing or other standards work required.
- Existing contracts: You may want to consider an audit of existing contracts to check for potential issues that could arise and maybe be renegotiated. This would be a sensible course of action to try to avoid a surprise issue arising post 29 March 2019.

Planning & Environment

- Despite the pre-occupation of Government with withdrawal from the European Union, planning law and policy continues to evolve. As the date of withdrawal from the EU draws nearer, it may be that the speed at which Government is able to bring about reform and take decisions on individual applications reduces as its time and energy is consumed by short term issues arising from Brexit.
- The Government published the revised National Planning Policy Framework (NPPF) in July 2018 and its effects are still being felt. The Government is undertaking a review of its Standard Need Assessment and publication of the results of its new Housing Delivery Test are still awaited; further updates to Planning Practice Guidance are expected in order to provide detail on implementing aspects of the revised NPPF. The Government has also published draft amendments to the Community Infrastructure Levy Regulations and has consulted on extending permitted development rights.
- The potential for significant effects on environmental law as a result of EU withdrawal was great as approximately 50 per cent of our environmental law originates from the EU. However, the Government made statutory instruments in October 2018 which suggest that there will be no immediate change to the Strategic Environmental Assessment and Environmental Impact Assessment regimes in the short term.
- The Government is due to publish an Environment Bill this year which is anticipated to ensure that environmental law remains largely unchanged following EU withdrawal, although it is expected to take the opportunity to introduce new measures on issues such as air quality and nature conservation, and to establish a new environmental regulator. The Government is also consulting on a requirement for developers to demonstrate how developments will improve biodiversity.
- With price increases on European-sourced construction supplies, the fluctuating value of the pound, and a potential reduction in EU migrant labour, the costs and resultant viability of projects may alter. Developers may be unable to deliver schemes successfully e.g. the affordable housing required. Altered project costs could give the opportunity for developers to engage with local planning authorities to reconsider and renegotiate planning obligations under Section 106 Agreements.
- UK residential development has long-benefited from demand pressures of population growth. If immigration lowers, this would reduce pressure for housing and development generally. However, the Government remains committed to delivering 1 million new homes by 2020 and the UK has an expanding demographic, aside from EU migration.

We surveyed in-house lawyers at our events and found that:

67% *of in-house lawyers believe Brexit will impact their business.*

Energy, Infrastructure & Government

- Public procurement regulations in the UK will remain largely unchanged in the event of no deal Brexit. However, UK opportunities will no longer appear in OJEU or the European Tenders Electronic Daily. The government will therefore launch a separate UK e-notification service and suppliers and contracting authorities will need to check the publication and notification platforms they use.
- Post Brexit, any state aid notifications not yet approved by the European Commission should be submitted to the CMA. In the longer term, the lifting of EU state aid restrictions may give the UK government more flexibility in relation to procurement and how it structures support mechanisms such as for renewable energy technologies.
- The legislative landscape in the waste sector is largely derived from EU law and is likely to remain unaffected by Brexit in the immediate future. The UK government has confirmed its commitment to maintaining environmental standards and to continue to uphold international obligations through multilateral environmental agreements. It has also committed to pass legislation to maintain the continuity of waste shipments between the UK and the EU in the event the UK leaves the EU without a deal, although new approvals processes need to be agreed with EU member states. In the medium and longer term, the recently published Waste and Resource Strategy sets out the direction of travel for policy and regulation which retains targets aligned with the EU Circular Economy Package. We may see the UK move away from weight-based targets and towards a carbon or value-based alternative in order to deliver better recycling rates and other environmental outcomes from waste and resources.
- EU structural and investment funds and the European Investment Bank have contributed to the financing of energy, waste, transport, regeneration and economic development projects across the UK. There is currently uncertainty over the extent to which the UK Government will create new UK funds to replace the levels of investment previously enjoyed. It has, however, agreed to guarantee all existing ERDF funding to 2020 if there is a no deal and use of the British Business Bank may go some way to plugging the gap left by the European Investment Fund.

If the UK sits outside the EU, then it will still be subject to the terms of international trading obligations for public procurement and state aid / anti-dumping.

Commercial Dispute Resolution

- The issues arising in a no deal Brexit scenario will relate to European cross-border disputes where parties are involved in a legal dispute with a counter-party based in another European country.
- As a member of the EU, the UK is part of an existing European wide legal framework which determines issues relating to (1) which country's law applies to disputes (governing law) (2) in which country's courts the disputes are to be litigated (jurisdiction) and (3) the enforcement of judgments obtained in one EU state in another EU state (enforcement). In a no deal Brexit, the UK will no longer be part of this European wide legal framework which will lead to some increased complexity in cross-border European disputes and some uncertainty.
- The position on governing law relating to contractual and non-contractual matters should not change. The relevant legal instruments (known as Rome I and Rome II) do not require reciprocity and as a result courts would continue to determine the law to be applied in cross-border disputes in the same way as they do now. The UK Government has confirmed it will incorporate the Rome I and Rome II rules into English law from the date of exit.
- Where there is less certainty is in relation to jurisdiction, namely in which country's courts the dispute is to be litigated. Without the European legal framework, English companies face some uncertainty as to whether parties will respect agreements made that only a designated court should deal with the dispute. This raises the prospect of anti-suit injunctions where one party seeks to prevent another party from litigating in another country's court and also the risk of parallel legal proceedings running in different countries, with a risk of inconsistent decisions.
- The UK Government has already taken steps to mitigate this risk by ensuring that the UK will become part of an international treaty called the Hague Convention on 1 April 2019. This is an international treaty which will apply between the UK and the other EU 27 states, even if the UK leaves the EU with no deal. It operates so that where there is an exclusive agreement to litigate in one country's courts, the other countries' courts will respect that agreement and not take the legal case. However the Convention only applies where an exclusive jurisdiction clause was agreed after the Convention came into force – which will only be on 1 April 2019 for UK. The UK has no control over how other states might treat exclusive jurisdiction agreements in favour of the UK which were agreed before 1 April 2019.
- If there is a no deal Brexit then it will become more difficult and costly to enforce English judgments in other European countries as there will no longer be any uniform rules applying across Europe.
- International arbitration remains unaffected in the event of a no deal Brexit. Arbitral awards are enforced under the New York Convention which operates outside of the EU legal framework and is binding upon the UK and the other 27 EU states, so nothing will change in respect of enforcing arbitral award in a no deal Brexit scenario. It is worthwhile considering agreeing to use arbitration to resolve disputes with contract counterparties as an alternative to litigation.