

Key Implications of Brexit

A high level review of the key implications of Brexit across a range of legal issues affecting UK businesses.

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: [WM Brexit](#)

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Economic forecasters concluded that Brexit is unlikely to cause a sharp slowdown in UK growth over the next three years.

- Deloitte

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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, force majeure or hardship clauses and, in particular, a well drafted pricing clause, may afford the necessary level of 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.
- 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 (perhaps) the EEA.
- Businesses in particular sectors - food and hospitality, for example - will be particularly adversely impacted by any restriction on the free movement of labour from Eastern Europe to the UK.

Following Brexit, the UK Government may have greater flexibility to provide state aid support to UK business.

Competition

- EU competition rules will continue to apply until the UK formally leaves the EU and the UK operates similar rules under domestic legislation, which will continue to apply post Brexit.
- Avoid discussing with competitors the detailed implications of Brexit for your business. We recommend that no discussions with competitors take place in relation to Brexit (other than very high level) without competition law guidance having been provided to the business in advance.
- 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 may be required, with additional time and cost burdens and regulatory uncertainty for businesses.
- Businesses might expect an increase in the number of parallel investigations at EU and UK level for competition law infringements with pan-European effects, potentially leading to a divergence in decision-making by the authorities. In addition, Brexit may affect the ability of UK businesses to bring follow-on damages claims in the UK in reliance on an EU infringement decision.

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, 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 as well as OFT/CMA guidance on unfair terms.
- 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 to 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 does not have an immediate impact on EU rights; EU trade marks and registered community designs remain valid and subsisting in the UK whilst Brexit is negotiated. However, EU trade marks and registered community designs will cease to have effect in their current form in the UK post Brexit.
- It is anticipated that transitional provisions will be introduced to provide proprietors with a mechanism to maintain or re-register their EU trade marks/designs in the UK. IP owners seeking protection across Europe should consider filing UK national trade marks/designs to sit alongside EU registrations.
- Licensing arrangements should be reviewed if there is a defined term "EU", which could mean the loss of exclusivity in the UK for a licensee of intellectual property when the UK leaves.
- 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.

Patents and copyright 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.

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 in the commercial property sector and in investment activity generally following the vote to leave. Although deal activity appears to have recovered, most obviously in the property sector, there are doubts as to how robust that recovery is in terms of investment activity generally. Depending on the outcome of Brexit negotiations, there is a serious risk of investors retreating from the UK with an obvious impact on the property sector and on deal activity generally.

Restructuring / Insolvency

- No immediate impact on restructuring / insolvency following the vote to leave or during Brexit negotiations as existing EU law continues to apply.
- If the EU Insolvency Regulation (which was recast from 26 June 2017) ceases to apply in the UK, UK-initiated insolvency proceedings may no longer be automatically recognised in EU Member States, and vice versa. This could significantly change the way in which cross border insolvencies are conducted and is likely to make coordination more difficult and expensive.
- English schemes of arrangement are often used by foreign companies for debt restructuring outside of formal insolvency. On Brexit, it is unclear the extent to which English law schemes of arrangement will be recognised in Europe. If the European Judgments Regulation ceases to apply, it may be that another convention applies (e.g. Lugano / Hague) but unless and until the terms of Brexit have been agreed, the situation will remain unclear.
- The European Union (Withdrawal) Bill suggests that all existing EU regulations will be incorporated into English law. This could mean the English courts recognising EU restructuring and insolvency procedures. However, without agreement from the EU / the remaining Member States, the UK would lose the mutual recognition rights currently enjoyed, meaning English law governed restructuring and insolvency procedures would become less certain and more expensive.

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 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 unless a deal can be struck as part of the Brexit negotiations.



*‘Prospectus
Passporting’*

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*Employment
hits a new
record high
of 74.6%.*

- Office for National Statistics
February 2017

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Employment

- There will be significant changes to immigration rules and requirements over the next few years. In some circumstances there may be proactive steps which would help the ability of key workers to remain in the UK and early advice may be useful in this regard.
- There are likely to be some deregulatory changes to UK employment laws derived from Europe. This will not happen overnight but employers may face an administrative burden in dealing with any changes as they happen.
- Certain sectors may scale back UK operations which, as well as having a direct effect on affected businesses, will create a wider ‘ripple effect’ in supply and service chains. We may see an increase in re-organisations and redundancies.
- A recent report found that, following the Brexit vote, growth in permanent hires has slowed as companies take a ‘wait and see’ approach. In turn, demand for temporary staff and interims is growing at a much sharper rate.
- 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.

Pensions

- In defined contribution schemes, any economic downturn 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.
- The EU Withdrawal Bill (previously referred to as the Great Repeal Bill) is currently making its way through Parliament. This Bill will incorporate all EU law into UK law, the Government will then decide which parts to repeal or amend. A large part of UK pensions law derives from EU law requirements, in particular the defined benefit pension scheme funding requirements. It remains to be seen to what extent the Government takes the opportunity which Brexit presents to make UK pensions law and regulation more flexible.
- EU law also protects pension scheme members against various forms of discrimination, for example age discrimination and sex discrimination. The Government has said that it intends to protect employment rights but it is unclear whether this will extend to the anti-discrimination requirements in pension schemes.
- 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.
- It remains to be seen whether Brexit will also result in a loosening of the regulatory requirements to encourage companies to use the UK as a base for their cross-border pension schemes.

Tax

- The UK may choose to set different rates for 'UK VAT' and could for example introduce zero-rating / reduced rating to different areas (fuel is an example of an area that has been discussed).
- The ongoing EU project to counter tax avoidance will no longer involve the UK on exit. However, the UK government has demonstrated a strong anti-tax avoidance focus over the last few years, and this is likely to continue.
- The EU directives which currently eliminate withholding tax between associated companies will no longer apply and UK businesses will instead need to either rely on double-tax treaties or withhold tax on such transactions.
- On leaving the EEA, the level of customs duties and red tape on UK imports and exports will depend on the terms of trade agreements made with the EU and other countries. If no agreement is made, WTO rules will apply.

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One in three global organisations are going to be changing their strategy and structure as a result of Brexit. Whilst many are waiting to see the extent of the resulting changes, some are already suffering negative consequences and having to restructure to remain competitive.

- Acritas Research Ltd
2017

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Real Estate

- Some practice areas which indirectly affect the real estate sector such as environmental, planning, agricultural and employment law are heavily influenced by EU legislation and as such are at risk of being overhauled. Further, any future legislation restricting the free movement of goods, people and services is likely to have an impact.
- Whilst a 'wait and see' culture is likely to subsist until the UK's future relationship with Europe becomes clear, there is evidence to suggest there is still confidence in the commercial property market.
- The initial knee-jerk reaction from the residential development sector, exemplified by some house builder prices crashing by almost a third, now appears to be in period of correction.
- Some investors, particularly overseas investors, are taking advantage of the financial uncertainty, with an increased opportunity to reduce price / rent and 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

- There are concerns, 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.
- Increased tariffs and taxes could mean that the cost of materials has a significant impact on the industry and an impact on fixed price contracts.
- Consider the impact of currency fluctuations where margins are already tight and possibly look to include exchange rate clauses in contracts.
- Brexit may impact the ability of businesses with a global focus to work with EU clients and may diminish value to them. However, most construction companies work exclusively in the UK. There is also the possibility that European contractors will be deterred from involvement in UK projects.
- Much EU regulation is already incorporated in UK Building Standards. There is no certainty that Brexit will mean the UK can avoid such regulation. If the UK wants a free trade agreement with the EU, it will likely be required to comply with EU standards in any event.

Planning & Environment

- The legislative landscape is likely to remain unaffected by Brexit in the immediate future. Elements of the Housing and Planning Act 2016 and Neighbourhood Planning Act 2017 still to go before Parliament, alongside ideas trailed in the Housing White Paper (February 2017), will bring the main policy and legislation changes in the short-term. The main impact will most likely be felt by way of something of a hiatus in planning policy, as parliamentary time becomes dominated by the European Union (Withdrawal) Bill.
- With price increases on European-sourced construction supplies, the falling 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.
- The environmental sector will feel considerable impact from Brexit, as approximately 50 per cent of our environmental law originates from Europe (including law on water, air quality, waste, chemicals, noise, energy efficiency and climate change). There is now the opportunity to relax some of these requirements to suit UK circumstances and bring a more streamlined approach - such as in relation to Environmental Impact Assessments (for major development applications) and Strategic Environmental Assessments (for local and neighbourhood plans).

Energy, Infrastructure & Government

- Government policy on renewables is driven by the Climate Change Act 2008 (which is a response to international commitments rather than EU Directive and Regulation), so these obligations will remain post Brexit.
- The speed of development and direction of the UK Government's policy on waste has been driven by EU law, such as the Landfill Directive and the Waste Framework Directive, which have provided a framework for investment in waste treatment infrastructure. Brexit casts a shadow of uncertainty over the waste industry not just in terms of investor confidence but also in terms of future Government policy.
- EU structural and investment funds 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.

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

- Post-Brexit, there is greater risk of parallel proceedings and conflicting judgments in UK/EU disputes and there may be a resurgence in anti-suit injunctions.
- Post-Brexit, there is uncertainty as to the rules which will apply to determine the applicable law which governs parties' contractual and non-contractual obligations. At present rules derived from the UK's membership of the EU provide the legal framework for the EU cross-border system.
- Without EU mutual recognition of judgment provisions, cross-border enforcement could be significantly more cumbersome and expensive.
- Arbitration will be unaffected and there is likely to be increased take-up of ADR. The period prior to expiry of the Article 50 notice may provide a window in which to resolve disputes within the current regime.
- The laws of legal professional privilege are not harmonised across the EU and it is not clear whether English lawyers will be able to assert privilege before EU courts post-Brexit.

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£400 billion has been added to the value of the UK's 100 largest businesses since the Brexit vote.

- This is money

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