



# Brexit: What to Expect and How to Prepare for the 'New Normal'

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The U.K. has voted, in a popular referendum, to leave the EU. The referendum is not legally binding and the result was extremely narrow: 51.9 percent in favor of leaving, 48.1 percent in favor of remaining. This partly reflected a protest vote against a range of issues. The vote in favor of Brexit was unexpected and took the markets, and even those campaigning to leave, by surprise.

There are no settled, coherent views or plans for a post-EU Britain from either the U.K. government, the EU or those in favor of Brexit. The devolved Scottish government has threatened to exercise a veto.

The process of leaving the EU will formally commence when the U.K. notifies the European Council of its intent to withdraw from the EU. Article 50 of the Treaty of European Union provides for the negotiation of a withdrawal agreement between the EU and the withdrawing state, defining the terms and conditions of the withdrawing state's relationship with the EU.

Only the British Government can trigger the Article 50 notification. The Government has already said that it will only make that notification once there is a clear view of the arrangements being sought from the EU.

If no agreement is concluded within two years of that notification, then the U.K.'s membership will end automatically, unless the European Council and the U.K. decide jointly to extend this period (the Interim Period).

The negotiation process is likely to be lengthy and will not be rushed. In the future, the U.K. could be part of the European Economic Area (EEA) or the European Free Trade Association (EFTA), or its relationship with the EU could rely on the framework of World Trade Association (WTO) rules. [Learn more about all of the potential models of a new relationship between the U.K. and EU.](#)

The U.K. is the world's fifth largest economy and London one of the world's preeminent financial and legal centers. Business and trade will continue and develop and the world will adapt. We live in interesting times, and dissatisfaction with the EU is not uniquely British. There have been recent calls for similar referendums in a number of EU member states, including the Netherlands, Denmark, Italy and Austria.

In the Interim Period, it will be critical for companies located both within and outside of the EU to monitor developments and prepare for the "new normal" business relations with the U.K. Very little is likely to change in the short term, but we are here to help navigate through what is undoubtedly going to be a period of uncertainty.

The comments below summarize some of the key areas which we will be monitoring during the Interim Period and on which we will continue to advise our clients as they prepare for the U.K.'s exit.

## CORPORATE

- ▶ At present, the European Commission generally has exclusive jurisdiction over mergers with an "EU dimension" (i.e. where certain cumulative EU turnover thresholds are exceeded), even where the transaction might also impact competition within the U.K. Post-Brexit, EU competition laws will still apply to U.K. companies doing business in the EU, but such companies would potentially face parallel investigations by both the EU and U.K. competition authorities. Such a dual system would increase costs and could potentially lead to inconsistent outcomes, so it is likely that some degree of coordination and subordination will be agreed in this area during the Interim Period.
- ▶ The impact of EU law on mergers and acquisitions in the U.K. is relatively limited, but the rules facilitating cross-border mergers of private companies within the EEA would be unavailable to the U.K. post-Brexit, unless it negotiates membership in the EEA (sometimes referred to as the "Norwegian model"). Although these rules have not been relied upon heavily by U.K. companies, they can provide added flexibility, particularly in the context of international group restructurings of non-operating companies.

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- ▶ On the plus side, the dramatic fall in the value of sterling may make U.K. companies very attractive to buyers based overseas, particularly in the United States, where the dollar remains strong.

## INTERNATIONAL TRADE

- ▶ Tariffs on goods imported into the U.K. from the EU and exported from the U.K. to EU member states will stay the same for the Interim Period.
- ▶ Tariffs on goods produced in the U.K. will still be covered under the Customs Union rates negotiated by the EU for the Interim Period.
- ▶ The U.K. will have options to negotiate some form of continued preferential duty treatment with the EU.
- ▶ It is likely that the U.K. will negotiate so as to maximize its traditional free trade position, meaning that it will likely negotiate with the EU to comply with EU product standards and regulations and to agree not to impose duties or barriers to trade with respect to member states of the EU.
- ▶ Whether the U.K. will agree to join the Customs Union or agree to a model that would give it little input into additional EU regulations will warrant close monitoring.
- ▶ The initial decrease in the value of the pound sterling may spur growth in trade outside the EU, creating new trading opportunities for the U.K. and closer ties with the U.S. and Asian economies.

## DISPUTE RESOLUTION - LITIGATION AND ARBITRATION

- ▶ For many years, London has enjoyed an unrivaled reputation as the dispute resolution center of choice for most countries outside the Americas. There is no reason to think that Brexit will have any major impact on that status. Indeed, one of London's principal attractions is that its civil justice system is very different from the Continental Civil Code systems that prevail in much of mainland Europe. That will not change.
- ▶ The reputation that London has earned for a high quality, impartial and incorruptible judiciary will remain, as will its access to a vast population of practitioners representing all jurisdictions.
- ▶ Brexit will, however, present challenges to areas of litigation that are particularly influenced by European Community law. The two most notable fields are competition law and intellectual property (see below). It remains to be seen whether our future treatment of these disciplines will diverge from the EU position.

- ▶ The U.K. is signatory to numerous international conventions governing the reciprocal arrangements for the recognition and enforcement of judgments and arbitral awards. Many of these are independent of our membership of the EU, and it seems far more likely than not that the current position will remain unaltered.
- ▶ London has been preeminent in arbitration for many years. In some respects, that choice is hard wired into the system, for example maritime disputes and insurance and reinsurance disputes. More generally, that reputation should prevail.
- ▶ In the short term, Brexit will address one of the enduring complaints about dispute resolution in London: cost. There is likely to be a short term competitive gain, as fees become relatively cheaper, especially for U.S.-based clients.

## COMMERCIAL CONTRACTS

- ▶ Most commercial contracts agreed under laws other than those of the U.S. are concluded under English law. Currently, English law includes all applicable EU laws.
- ▶ Commercial contracts are relatively lightly regulated and many of the regulations (e.g., on transfers of employees) are incorporated into domestic law.
- ▶ Contracts with commercial terms and pricing assumptions for goods or services based on tariff-free movement of those goods or people to deliver those services (particularly where services cover a number of jurisdictions) will need to be reviewed in the medium term.
- ▶ Allocation of risk for currency fluctuations will also need to be considered in the short term.
- ▶ Brexit is only likely to trigger termination rights on the basis of material adverse change or force majeure event in only the most exceptionally widely drafted provisions.
- ▶ Some EU driven, mandatory legal provisions (e.g., mandatory payments to commercial agents on termination) may also need to be reviewed following withdrawal from the EU, although this is unlikely to be a high legislative priority and would be several years away.

## PRODUCT STANDARDS

- ▶ The EU currently sets a wide range of product standards, information and labeling requirements relating to health and safety and the environment.
- ▶ There may be a temptation to amend some of these regulations to ease the administrative burden on U.K. businesses or to attract overseas businesses with a low-regulation environment.

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However the scope for amendment will be limited due to the risk of damaging U.K. businesses' interests given that they would need to comply with product standards to market their goods in EU countries.

- ▶ In the medium term, businesses may need to monitor and comply with EU standards. They will have far less influence, through trade groups of government representations, when the U.K. formally withdraws from the EU.

## FINANCIAL SERVICES

- ▶ EU directives allow financial services firms authorized in one member state to carry on business in any other member state without the need for a separate host state authorization (the so-called passport system), either by establishing a local branch or on a cross-border basis. London has therefore become the base from which many financial institutions carry on their business both in the U.K. and in the rest of Europe.
- ▶ Once Brexit occurs, firms authorized in the U.K. will not be able to use the passport to operate in Europe. Similarly, U.K. Alternative Investment Fund Managers will become 'third country firms' for AIFMD purposes. Without some sort of negotiated equivalency regime, managers may need to instead rely on complying with each EU state's private placement regimes, which can be cumbersome and expensive.
- ▶ The consequences to the financial services industry will largely depend on the agreement reached in respect of financial services with the rest of the EU. Given the potential impact this might have on London's reputation as the principal financial center in Europe, it is likely that an alternative accommodation will be high on the exit negotiation agenda.

## EMPLOYMENT

- ▶ From a U.K. employment perspective, there is no reason to believe that anything will change during the Interim Period.
- ▶ Even once Brexit has happened, the main laws that govern the employment relationship in the U.K. are likely to remain in place. There may be some tinkering with certain aspects of legislation that has been unpopular with employers (such as regulations relating to employee transfers and collective redundancy) but the fundamental principles of this legislation are unlikely to change.
- ▶ The ability to manage HR projects across different European jurisdictions from the U.K. will continue.

## IMMIGRATION

- ▶ The message to employers – "Know Your Workforce."
- ▶ Employers need to know the nationalities of employees who

are working in the U.K. and the EU. This information will be vital to HR strategic planning and preparing for potential work permit applications for British citizens in EU member countries and for EU member countries' citizens in the U.K.

- ▶ Employers need to know how long their British citizen employees have been residing and working in an EU member state or states and how long their EU member state citizen employees have been residing and working in the U.K. Some of these employees may (or soon will) be eligible for permanent residence in their host country. Success in obtaining permanent resident status in the host country eliminates the need to apply for a future work permit in that country.
- ▶ Employers outside the U.K. and EU should consider who they might wish to transfer (or send as a business visitor travel) to the U.K. and the EU during the upcoming months. If the intention had been to rely on that individual holding certain nationalities (e.g., a dual U.S.-Italian citizen transferring from the U.S. to the U.K. by virtue of their Italian nationality; or a dual U.S.-British citizen transferring from the U.S. to Germany by virtue of their British nationality), it might be necessary to consider such planning carefully based on nationality, location, timing and duration of travel.

## REAL ESTATE

- ▶ Real estate transactions and obligations in the U.K. are primarily governed by national legislation, not EU-derived legislation.
- ▶ The U.K. may relax some areas of EU-derived environmental law, such as energy efficiency requirements and environmental impact assessments.
- ▶ The property industry and U.K. real estate market as a whole may be affected by general economic instability and the potential reduction in the flow of foreign capital into London. However, the U.K. (and London in particular) can remain an attractive prospect for real estate investment because of London's global city status, the U.K.'s transparency and ease of doing business, the security and sophistication of the English legal system, the U.K.'s population growth (particularly in London), the U.K.'s safe haven status relative to other jurisdictions, and the U.K.'s well-developed and mature real estate market and ancillary services.

## DATA PRIVACY

- ▶ EU data protection laws are going through a further process of harmonization through the introduction of the General Data Protection Regulation (GDPR).
- ▶ One of the key principles of EU data protection law provides that personal data must not be transferred to a country or territory outside the EEA unless that country or territory

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ensures an adequate level of protection for the rights and freedoms of individuals in relation to the processing of their personal data.

- ▶ Companies receiving personal data from EU member states would need to demonstrate to the European Commission that U.K. law provides an adequate level of protection through its domestic laws or international agreements, such as the EU-U.S. Privacy Shield, which is currently being negotiated by the European Commission and US Government.
- ▶ Both options would require that the U.K. complies with essentially equivalent standards to the new GDPR. The alternative would require U.K. businesses wishing to receive personal data from the EU to rely on other, potentially far more burdensome and costly, mechanisms in the form of EU Standard Contractual Clauses for the transfers of personal data.

## INTELLECTUAL PROPERTY RIGHTS

- ▶ The U.K.'s decision to leave the European Union (EU) will not affect the current European patent system administered by the European Patent Office (EPO) because the EPO is not an EU organization. Rather, the EPO is governed by the European Patent Convention (EPC), and the U.K. will remain a member of the EPC, regardless of the U.K.'s departure from the EU. Accordingly, applicants will continue to be able to obtain patent protection in the U.K. by filing a European patent application at the EPO.
- ▶ There are 42 countries that are members of the EPC, and there are currently 28 EU member states, including the U.K. Notable countries that are members of the EPC but not members of the EU include Norway, Switzerland and Turkey. Once the U.K. leaves the EU, it will continue to be a member of the EPC.
- ▶ The potentially new European Unitary Patent system, which is currently undergoing ratification, is limited to EU member states. The U.K. will, therefore, not be able to participate in such a system, to the extent the system is fully ratified, because the U.K. will not be a future member of the EU. Nevertheless, the existing European patent, which is envisioned to co-

exist with a Unitary Patent, will continue to be available to applicants, including those who wish to obtain U.K. patents through the EPO.

- ▶ Similarly, the Unitary Patent System also includes a Unified Patent Court system, which similarly only applies to Unitary Patents. U.K. patents will, however, continue to be enforceable in the U.K. courts.
- ▶ Businesses may have a mix of U.K. national trademark registrations, European Union Trademark (EUTM) registrations and Madrid system (International) registrations designating the U.K. or the EUTM.
- ▶ No action is required at this time, because the affected trademark offices have not outlined next steps.
- ▶ U.K. national trademark applications and registrations should not be affected.
- ▶ Existing EUTM trademark registrations may be able to transition to national applications in the U.K. Some type of change will be required, because the EUTM is based on the European Intellectual Property Office (EIPO). These changes could take place sooner than the two-year transition period.
- ▶ Because the U.K. is already a member of the Madrid system, if the Madrid application/registration extended into the U.K., we anticipate that no change will be required. If, however, the Madrid application/registration extended into the U.K. via selection of the EUTM and not the U.K. specifically, then adjustments may be needed.
- ▶ In an abundance of caution, national applications may be filed now in the U.K., although that will later require issues regarding potential duplication of trademark protection to be addressed if existing registrations are later converted to national applications.
- ▶ If you would like to obtain new trademark protection in the U.K., and do not plan to use the Madrid process, the safest route in the near term may be to file national applications, rather than filing through the EUTM system.

## About Faegre Baker Daniels

FaegreBD is a full service law firm advising clients with legal issues in more than 100 countries. From offices in the U.S., U.K., and China, our 750 corporate, litigation and regulatory professionals collaborate to solve complex business challenges in a dynamic global marketplace.

## Our London Office

FaegreBD's experienced London professionals bridge international boundaries to prevent those borders from becoming obstacles to our clients. We provide corporate finance, mergers and acquisitions, banking and finance, dispute resolution, labor and employment, commerce and technology, and commercial property advice to clients in all markets using English Law.

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