



# A practical guide to Britain's potential break-up with the EU

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Would you buy a house without viewing it first?

Would you buy a car without test driving it?

Would you do business without first understanding who you're doing it with?

All of the above are important life decisions and the likely answer to them all is no.

So why are so many prepared to wade into the Brexit debate without, first, arming themselves with the facts?

# Foreword

On 23 June 2016, the UK population will vote on whether or not the UK should remain a member of the EU. Whilst this topic is among the most widely-debated issues throughout history, one thing that is largely agreed upon is that any form of Brexit - as it has become known - will have a significant impact on a social, economic and political level.

If the British people vote yes to Brexit, Britain will be forever transformed. But what will it look like?

We cannot be certain of what the UK will look like, as a non-EU member, and this lack of clarity forms part of the reason why the issue has sparked so much controversy. But in this practical guide, we aim to demonstrate the potential impact Britain's exit from the EU might have on businesses. We will also provide some tips on how to start preparing for a potential break-up.

"In June we can choose to shape our world, not to be shaped by others. We can choose to stay in the biggest single market on Earth. We can choose economic security, not an unnecessary leap in the dark. We can choose to be stronger, safer and better off - and that's what I hope the British people will do when the moment comes."

David Cameron

"This is like the jailer has accidentally left the door of the jail open and people can see the sunlit land beyond. And everybody is suddenly wrangling about the terrors of the world outside. Actually it would be wonderful. It would be a huge weight lifted from British business."

Boris Johnson

# What are Britain's exit options?

Whilst some of the discussion, surrounding the topic of Brexit ends, for some, at the words “in” or “out”, we believe it's just as important for businesses to be equipped with all there is to know about the suggested exit options there are to choose from.

It is unlikely that Britain would simply select a shop bought option. Rather it would seek to negotiate a tailor-made relationship with the EU. But there are existing models in place, used by non EU-countries, which could form the foundation for Britain's new model.

Below, we set out some of the key points to consider as part of each option.

## The Norwegian Model – EEA

Britain could choose to leave the EU and instead become a member of the European Economic Area (EEA). Countries that have adopted this model to date include Iceland, Lichtenstein and Norway.

- Certain EU laws including those concerning competition, employment and environment would continue to apply. Any future laws passed within this area would also, most likely apply.
- Under the Freedom of Movement policy, Britain would not be able to limit EU immigration.
- UK businesses would still have access to the single market - an association of countries trading with each other without restrictions or tariffs. The European single market came into effect on 1 January 1993.

## The Swiss Model – EFTA

Instead of joining the EEA, the UK could choose to re-join the European Free Trade Association (EFTA). This would essentially mean emulating Switzerland. The UK was one of the original members of this model. In fact, Britain was a driving force behind the model's establishment in 1960. But 13 years later, it decided to join the European Economic Community (EEC) instead.

- The UK would have some access to the EU's internal market. However, the Swiss-EU relationship is based on a series of complex bilateral agreements which could mean restrictions. For example, it would have to adopt the Freedom of Movement policy.
- Unlike in the EEA, the UK would retain control over key policy areas such as agriculture and fisheries, as well as foreign and security policy and justice and home affairs.
- The UK would be able to carry out trade agreements with other countries although each agreement would need to be negotiated on an entirely separate basis.

## The Chinese Model – World Trade Organization Agreement

In theory, this is the most “simple” exit option because no agreements would need to be negotiated. Instead, the UK would rely on the World Trade Organization (WTO) for trade within the EU. Essentially, the same rules would apply to Britain as the United States or China.

- The UK would have total independence and would not be directly subject to any EU law.
- In addition, complete control over UK borders could be maintained irrespective of the Freedom of Movement policy.
- The UK would no longer benefit from any free trade agreements between the EU and other nations. Instead each agreement would need to be negotiated separately.

## The Mexico Model – Free Trade Agreement

Alternatively, the UK could forge a relationship based on one comprehensive free-trade agreement outside of the EU customs union. This model has been adopted by South Korea and Mexico.

- The UK would have the freedom to set its own laws.
- The UK would have access to tariff-free trade in goods, dependent on the country of origin conditions. Again, individual negotiations would be required.
- The UK might garner potential access to all or parts of the single market for services, but would not have much power over setting any rules.
- The UK would be exempt from any contribution to the EU budget but would then rely on membership of the World Trade Organisation as a basis for trading with the EU. There would be no separate agreements in place with the EU or its individual members.

## The Turkish Model – Customs Union

Another option would involve the UK leaving the EU and entering into a customs union, as Turkey has done.

- As a condition of the agreement, the UK could be obligated to implement certain EU legislation.
- Whilst the UK would have access to the internal market, it could be required to implement tariffs with extra-EU countries. In addition, this arrangement could also be limited to goods only thus eliminating services such as those of a financial nature.
- The EU would be able to negotiate any trade agreements without involving the UK.

# What would replace current EU laws?

**A vote to leave would not immediately part the UK and the European Union. After the immediate formalities of Britain withdrawing from the EU, it has two years to negotiate terms and conditions.**

**In advance of the referendum's decision, the Government has already renegotiated certain terms including restricted benefits for EU migrants as well as guarantees that the UK will be under no obligation to bail out any flailing Euro members.**

## But what are the legal mechanics of Britain's withdrawal?

Currently, there are a number of EU Treaties and Regulations that are applicable to the UK. These would essentially cease to exist, as far as the UK is concerned, should it leave the EU.

In addition, any EU Directives that are in place do not simply automatically apply. Directives are only enacted either through changes to UK law, or by the UK choosing to expressly adopt policies. As a consequence, any existing EU regulations would immediately fall away leaving major gaps in certain areas of UK law.

## What are the broader possible impacts?

Whilst the macro-economic information on pages 2 and 3 highlights many of the key legal implications that a Brexit may have, there are other, wider concerns that should be addressed:

### Economic uncertainty

Many businesses have already expressed their concerns over the uncertainty of Britain's future after the referendum. Meanwhile, economists are suggesting that even the idea of a Brexit is impacting the UK's economy. UniCredit economist Daniel Vernazza recently explained that while U.K. consumer confidence remains stable, business confidence is diminishing.

### Political contagion

It's likely that the UK's concerns, regarding the EU, are shared in other member states. If Britain chooses to leave, and is seen to be successful as a result of that decision, the potential ramifications for other European countries could be enormous – seeing other strong states choosing to liberate themselves as well.

# Post-Brexit legal implications

## Competition Law



Competition law regulates economic activity by ensuring that businesses operate on a level playing field. This is done to enable customers to enjoy the best range of goods and services, at the best possible price.

Currently, much of the UK's competition regime is modelled on EU competition law – therefore, in theory, it could be heavily disrupted following 'Brexit'.

The main aspects of EU competition law that impact UK businesses, as well as the UK's very own competition law framework and enforcement regime relate to:

- the prohibitions against anti-competitive agreements and abuses of a dominant market position
- merger control
- state aid

The principal issue is that, currently, the EU competition regime overrides the UK's in cases of conflict. Therefore, should the referendum result in Britain leaving the European Union, any UK company which does business in the EU will still have to continue to comply with EU competition law regardless of the UK's membership of the EU.

Following on from that, if there were then to be changes to EU legislation relating to prohibitions, such as the enforcement regime or anti-competitive agreements, the UK would no longer have a say in what those changes should involve or how they are implemented.

If the UK were to leave the EU and it chose to no longer apply EU case law, there could be a risk of divergence between the two separate regimes. This could lead to more complexity, as businesses would have different applicable standards, depending on whether they were doing business in the UK or the EU.

If, as a non-Member State, the UK chose not to continue relying on EU case law, it would then have to develop its own case law. This could be seen as a waste of resources as it is not generally suggested that the UK wishes to diverge from current EU case law. Therefore, it could be seen as reinventing the wheel.

## Merger Control

If the UK were to leave the EU the EU merger control regime would continue to apply to any merger which met the EU merger control thresholds but it is likely that as a non-Member State of the EU, the UK's own competition authority (the CMA) would also review the merger, if so regulatory control would increase as a result of Brexit.

## State Aid

If the UK were not to continue to comply with the EU's state aid regime, technically it would mean that the UK could begin to provide more support to UK companies or give preferential tax or other arrangements of the type that are currently being criticised (such as for Amazon and Starbucks). In the absence of the UK's voice in the EU we could also see the EU drifting to a more interventionist approach to state aid as it would lack any curtailing influence from what has traditionally been the UK's more liberal market approach to state intervention.

## Dispute Resolution



In an uncertain world in the event of UK exit from the EU, some aspects of English law implemented as a consequence of EU Case law or Directives could be tested in the English courts with a view to examining their continued legal applicability.

A UK withdrawal is likely to cause parties to re-assess their new economic and legal landscape, its impact and cost on its existing contractual commitments and the possibility of circumventing contractual obligations, such as seeking to rely on a material adverse change clause, a force majeure clause or maintaining that a contract is frustrated.

These issues are likely to give rise to disputes, and parties would do well to review their existing commercial relationships to ascertain whether any issues of this, or similar nature are likely to surface in the event the UK were to leave the EU. Given the current uncertainty of the UK's position in the EU, it would be advisable when negotiating the terms of a new contract to consider how that contract might be affected in the event of a UK exit, and seek to provide accordingly in the contract insofar as possible.

Exit from the EU would mean that pivotal EU legislation with respect to jurisdiction, service and reciprocal enforcement of judgments would cease to apply to the UK. Absent similar alternative provisions being agreed post exit, English law has its own rules on jurisdiction and enforcement of judgments which would probably apply in cross-border cases in the English courts involving EU parties.

The enforcement of English judgments in the EU, or vice versa, would be more ponderous, and would rely on domestic rules of law in the relevant jurisdiction. Potential difficulties of enforcement may have an impact on the allure of London as a litigation centre in the absence of a new agreement with those continuing EU member states. As regards existing EU litigation, the possibility of the UK leaving the EU may weigh in favour of seeking to obtain a judgment as soon as possible to take advantage of the EU recognition and enforcement mechanism.

Arbitration with its seat in London should not be affected by a UK exit as the UK will remain a party to the New York Convention, along with all the remaining EU Member States.



## Employment Law



Some of the most contentious UK employment law rights are derived from Europe. It is therefore highly likely that a Brexit would lead to some changes to UK employment law, but the degree of change is presently an unknown quantity.

Brexit could potentially lead to a substantial re-write of key UK employment laws derived from European law. However, it might only lead to a tinkering of existing employment law. Given that the EU is likely to require the UK to comply with core European employment legislation in return for more favourable trade relationships with Europe, we are unlikely to see a wholesale rewrite of UK employment laws any time in the near future. Until there is a legislative change, the UK courts and tribunals will be compelled to follow the precedent of higher courts and tribunals, which have applied European law.

The Conservative Government is likely to want to reduce red tape on UK employers, to make the UK economy more competitive. In the event of Brexit, the Government may be interested in reviewing three key areas of employment law as a starting point:

- Reducing the impact of TUPE in an outsourcing or insolvency situation, to give clients greater freedom to open up competition amongst suppliers.
- Limiting the scope of holiday pay and holiday pay claims. For example, by limiting the ability of workers to enforce their rights in a tribunal, to reduce costs for employers and the strain on the legal system.
- The impact and effectiveness of work-related immigration. The Government is likely to look to strike a fair balance between enabling employers to be able to recruit the best talent whilst reducing immigration from overseas nationals.

## Environmental Law



UK environmental laws are EU heavy. EU Directives such as those relating to environmental permitting (EP) and the EU Emissions Trading Scheme (EU ETS) are enshrined now in UK domestic law. The EP regime is extensive in its reach and affects sectors ranging from waste and energy to manufacturing and mining. A Brexit would not affect these existing laws unless there is a desire to change them. Any change would involve a full scale review of the existing legislation and partial or full repeal with subsequent re-enactment. This is likely to take years if, indeed, there is a desire to change anything at all. The appetite for change may be limited given that the UK trades on a pan European basis. Continued compliance with EU regulations may be required in order for UK based business to be regarded as sustainable trading partners.

Some EU environmental regulatory regimes such as REACH apply directly in the UK independently of any UK domestic legislation. Depending on the exit model chosen, those regulations may no longer apply. This worrying scenario leaves the UK Government with a challenge in tracking and policing the use of hazardous chemicals frequently used in the commercial supply chain.

Climate change goals are less likely to be affected by any Brexit. It is not easy to reconcile a departure from the EU ETS with UK obligations under the international Kyoto Protocol. The same may be true of other UN Environmental Conventions relating to habitats and the protection of endangered species.

## Financial Services Regulation



The UK is the EU's principal financial centre meaning that Brexit could have a significant impact on financial services regulation not just in the UK but for those states that choose to remain in the EU.

### Passporting

If a UK-authorized firm wants to provide financial advice, set up a base or run permitted activities in an EEA state, they can currently apply for a 'passport' to do this. Under the terms of EU legislation, firms authorised in one member state of the EU can carry on business across the EEA – this is their right of free movement. A qualifying UK firm can "passport" by establishing branches in one or other member states or by offering its services cross-border into one or all of them; it does not need to be separately authorised in those other states, but can rely on its FCA/PRA permissions. This can extend beyond investment services to some products: so it is possible to passport retail investment funds ("UCITS" via the UCITS Directives) and public offers of securities (via the Prospectus Directive) throughout the EEA.

### Content of EU legislation

For many years, the content of UK financial services legislation has been to a large extent (though certainly not entirely) determined by EU Single Market Legislation. Two current examples among many are the Mortgage Credit Directive (to be implemented in the UK in March 2016) and the new package of measures on market abuse (some of which is directly applicable but otherwise must be transposed into UK law by July 2016).

### Contracts

Many contracts in the financial services area – including standard client terms of business – will mention, rely on or imply EU financial services legislation. Again, depending on the terms of a Brexit, these contracts may need to be reviewed. There will be some circumstances (again for example a Norway-type situation) where change will be minimal or non-existent. A withdrawal from much EU legislation may involve widespread changes in many areas – even employment contracts may be affected by the remuneration rules on bonuses etc. no longer applying.

## Intellectual Property



UK intellectual property law is heavily influenced by EU law. The UK Trade Marks Act 1994 was enacted to give effect to an EU Directive harmonising trade mark laws across the community. UK companies can register EU trade marks which apply across the EU. They can register EU wide patents at the EU Patent Office. A new unitary patent system and EU Patent Court is due to be introduced in the next few years. Interpretation of UK intellectual property law is often determined by the EU Court of Justice.

Following Brexit, there would be a minimum of a two year transitional period which could be extended by agreement. Trade marks registered with the UK Intellectual Property Office would continue in force but EU Registered Trade marks would only continue in force in the UK after the two year transitional period if agreement could be reached with the EU. It is likely that registered owners of EU Registered Trade Marks would lose protection in the UK after the two year period and have to register additional UK trade marks to regain protection in the EU but these would probably be back-dated to the date of their EU mark. The same position would apply to Community Designs.

If the UK remained in the European Economic Area like Norway then EU influenced national IP legislation is unlikely to be changed in future as EEA members are bound by most IP Directives of the EU. Rules on exhaustion of rights in the EU which prevent trade mark owners restricting the free movement of their goods within the EU also apply to EEA members. The new EU Patent system and EU Patent Court is unlikely to extend to the UK after Brexit so UK patents would have to be enforced in UK courts. If the UK also left the EEA then the rules on exhaustion of rights for trade marked goods would no longer apply and price differentials could arise between UK and EU markets. In addition UK courts would not be bound to follow EU Court of Justice rulings and there could be a gradual divergence of UK and EU law although the basic law would continue unless new legislation was introduced.

## Data Protection



UK Data protection law was largely created by the EU Data Protection Directive 1995 which is currently implemented in the UK by the Data Protection Act 1998. If the UK left the EU but remained in the EEA like Norway then the Data Protection Directive would continue to apply to the UK and a forthcoming new General Data Protection Regulation due to come into force this year would also apply in the UK. This will substantially increase fines for non-compliance and impose duties to warn consumers and regulators of security breaches and require greater levels of consent to reuse data for marketing purposes.

If the UK left the EU and also left the EEA then neither the Directive nor the Regulation would apply to the UK and it could change its Data Protection law and diverge from that of the EU. However, the EU rules preventing transfer of data to countries outside the EU or EEA without sufficient data protection laws would then apply to the UK and the EU Commission would have to decide whether the UK was a "Safe Harbour" country with sufficient safeguards.

## Tax Law



Goods move between EU member States free of customs duties. It remains to be seen whether, following Brexit, the UK would secure an agreement to be part of a free trade area with the same benefits and, if so, on what terms.

VAT is the only tax where the framework for the levying of the tax is prescribed by EU law. The UK would almost certainly choose to retain existing VAT rules after Brexit, but would have a free hand to modify the rules over time.

Brexit would have little or no immediate impact on corporation tax and income tax. Each member state has its own rules. Harmonisation of corporate tax systems has been talked about in the EU, but without much in the way of practical consequences. Nevertheless, some UK corporation tax rules have had to be changed to be consistent with principles in the EU Treaties (sometimes to the advantage of business). There are also some helpful EU tax rules for groups operating across the EU but in practical terms these are largely reflected in the UK's own laws and its wide network of Tax Treaties.

Whilst Brexit would free the UK from being part of any further EU tax harmonisation projects, the wider international dimension will still inevitably impact on the UK. For example, this year's Budget includes measures resulting from the OECD Base Erosion and Profit Shifting Project (aimed at tax planning techniques adopted by multi-national businesses which have attracted news headlines).

# How to prepare your business

Whilst the exact outcome of a potential Brexit remains uncertain, the topic is no longer a simple debate over a pint in the local pub. Indeed, a vote would certainly not change the world overnight but complacency could be detrimental to you and your business.

With that in mind, having a contingency plan in place will not only prepare for the unknown, it will give you that all important peace of mind.

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|----------|--|----------|---|
| <b>1</b> | In the first instance, consider how any outgoings and ingoings may be affected.  | <b>5</b> | Do you need to make any changes to your IP strategy to ensure you're protected?   |
| <b>2</b> | Forward plan and forecast – what are the potential commercial implications for your business?                                  | <b>6</b> | Are your existing licensing and trade mark arrangements ready for a Brexit?   |
| <b>3</b> | Do you employ a number of non-UK nationals? How might their departure impact your business?                                    | <b>7</b> | Seek advice from a specialist lawyer. Keystone can provide advice across a broad range of areas and can help you prepare your business, whatever the outcome. |
| <b>4</b> | Do you have suppliers or business partners in other countries? Would your relationship with them change should a Brexit occur? |          |   |

# Key contacts

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