

Brexit: Will it happen? What happens if it happens?

Marie Bates | 4 March 2016



A referendum is to be held on 23 June 2016 on the United Kingdom's continued membership of the European Union (EU). This means that UK citizens will be asked to vote on the following question:

Should the United Kingdom remain a member of the EU or leave?

IN ... the UK will remain a member of the EU, based on agreed reform of the EU.

OUT ...the UK will cease to be a member of the EU, commonly referred to as Brexit.

This briefing is intended to provide an overview for clients and contacts who are interested in the referendum, including the legal implications should the UK decide to leave the EU.

The referendum timeline: what happens next?

NOW: Politicians from each political party have aligned themselves alongside the "IN" or "OUT" campaign. Although David Cameron and the majority of his cabinet members are backing the "IN" campaign, David Cameron is allowing members of his governing Conservative party to openly oppose him on this matter. As at 26 February, 129 of his 330 members of parliament had come out openly as backing the "OUT" campaign. The vast majority of the opposition Labour party are backing the "IN" campaign. Non-party individuals are also permitted to campaign, although they must follow certain rules and register as campaigners.

The polls are also placing it as too close to tell. However, certain members of the business community have spoken out to express their support for the "IN" campaign by signing a letter published in the Times newspaper (the letter published in the Times newspaper on 23 February was signed by 198 members of the business community, including 36 chairmen and chief executives of FTSE 100 companies).

23 JUNE 2016: Referendum day.

Who can vote?

British citizens, Irish and Commonwealth citizens who meet certain residency requirements and British citizens' resident overseas (provided they have not been resident overseas for 15 years or more).

2+YEARS: If the UK votes to leave

If the UK votes to leave the EU, there will be no change overnight.

A Member State must give the EU at least two years' notice to European Council of its intention to leave. In this period the UK will negotiate a withdrawal agreement "setting out the arrangements for withdrawal, taking account of the framework for its future

“A key element of the referendum was that any vote on the continued membership of the EU would be on the basis of a reformed relationship with the EU.”

relationship with the Union" (Article 50 of the Treaty on European Union). Negotiating the withdrawal agreement will be a long and complex process:

- From a practical perspective, transitional arrangements will need to be considered to ensure that disruption is limited.
- From a political perspective, a decision will need to be made as to what the ongoing relationship with the EU will be and what will be preserved from the past.
- From a legal perspective, steps will have to be taken to implement the withdrawal, including implementing the withdrawal itself through an Act of Parliament, and repealing or amending matters that will no longer form part of national law.



Legal implications of Brexit

What happens to existing rights and obligations?

Citizens of EU Members States currently have the benefit of, and are subject to, a network of legal rights and obligations under EU laws. Some of these laws are directly applicable in the UK, and others are applicable as they have been implemented into UK national law.

What is the status of such rights and obligations following an exit from the EU?

Where a matter has been implemented into national law, then this will continue to be law following exit until that law is repealed or amended. However, where this is not the case, the position is more complicated. It seems likely that some of the rights will have "vested" in citizens (i.e. they will not be automatically be reversed once the relevant EU law no longer applies) and those rights will need to be reversed by domestic laws (should the UK choose to do so).

If the UK decides to retain existing, or to implement future, EU-derived laws, regulations and policies, it is not yet clear whether the UK courts will look to the EU courts to assist its interpretation of such matters.

What areas of UK policy and law will be affected?

An exit from the EU will impact all key areas of UK policy, and a decision will need to be made as to how the UK will proceed in these policy areas. At the moment, there are more questions than answers but some headlines areas include:

Agriculture

Will the UK continue the current subsidies and support to UK farmers, as exists under the Common Agricultural Policy of the EU?

Art & Heritage

Apart from issues relating to the easy movement of items within the EU, may this increase pressure to withdraw the artist's resale right? And where will it leave the UK's commitment to matters such as the return of stolen items?

Banking and Financial Services

Would any exit deal enable Britain to continue using marketing, branch and services passports? How quickly would British FS rules diverge from those in the remainder of the EU? Would the UK authorities seek to keep the burden of FS regulation at about the same level or take a de-regulation approach, or might they seek to go further in certain areas to create a "gold standard"?

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Charity

Will Brexit allow the Government to relieve charities from the burden of irrecoverable VAT? Will European charities stop being able to register with HMRC as charities for tax purposes? Will UK NGOs become ineligible to receive EU grants?

Data Protection and Privacy

Will the UK continue to align its policies and principles on data protection and privacy with those of the EU? Will it adopt the EU reforms on data protection that are likely to become applicable to EU Member States in 2018?

Disputes and Litigation

What will be the consequences for mutual jurisdiction, service, and recognition and enforcement of judgements regimes? Would the UK enter into treaties such as those operating between the EU and Switzerland? Will Brexit lead to the repeal of the Human Rights Act? If so, what form would human rights protections then take and how would this impact on the administration of justice?

Employment and Immigration:

Will the UK continue to allow the free movement of people? Will it agree to this to get the benefit of EU trade treaties? Will the UK repeal certain employment laws that were derived from the EU, e.g. the Working Time Regulations 1998?

Family

Will the "Brussels II" regulation on international divorce and children cases no longer apply? Will the English courts have the opportunity to decide whether or not to hear those cases only on English law principles? Will the UK cease to be a part of the European Union's scheme for enforcing maintenance orders across member states?

Higher education

Will Universities be able to charge EEA students overseas fees? Will UK institutions cease to be eligible for European research funding? What will happen to existing vehicles for pan-European collaboration and research involving UK institutions?

Intellectual Property

How will Brexit impact on the scope and validity of current and future Community Trade Marks (which offer EU-wide trade mark protection) and to what extent to which they will provide trade mark protection in the UK? Will UK consumers continue to be entitled to the same level of legal protection when receiving goods and services from traders located in other EU member states and, relatedly, will UK traders have to offer such protections to consumers in other EU member states?

Property

How will foreign investment in UK property change? Will UK property prices fall as a result of the anticipated decrease in immigration from Europe?

Private Wealth

Brexit would cause further complications for UK based individuals who die leaving houses, land and other assets in mainland Europe. Although the UK has already opted out of the European Succession Directive (as Denmark and Ireland), the inheritance rules which came into force in August 2015 in other EU countries make a distinction between EU Member States and "third states" – countries outside the EU. Whether an English resident's French or Spanish holiday home passes unchallenged to their chosen heirs could depend on whether they die while the UK is a Member State or, after Brexit, a "third state".



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Trade and Business:

Trade treaties will have to be drawn up between the UK and EU Member States. Goods can currently move freely within the EU without being subject to duties. Will this continue? The regulation of financial services is extensively derived from the EU. The UK will need to consider the extent to which it will retain these regulations.

Contractual issues

English law enshrines the principle of freedom of contract, and EU law largely does not intervene in contractual arrangement between parties (subject to certain exceptions where there is unequal bargaining powers). However, private contracts may also be impacted if the UK leaves the EU.

The choice of governing law and jurisdiction are matters that are currently addressed by EU regulations. For example, in the area of family law, pre-marital agreements are currently heavily influenced by EU regulations. The UK will need to decide whether it will retain EU principles on these matters.

From a practical perspective, depending on the nature of the contract, parties to a contract may find that UK's exit from the EU impacts on their ability to perform a contract (e.g. prohibitively high costs that may arise in a supply of goods contract to another EU Member State). Parties entering into contracts may wish to consider including termination rights or a force majeure clause into an agreement if they believe their contractual arrangement will be affected by a UK exit from the EU.

What happens after Brexit?

European Free Trade Association (EFTA): The UK could become a member of EFTA. EFTA is a free trade area as between its member states (currently Iceland, Liechtenstein, Norway and Switzerland). It enters into free trade agreements with other non-EU countries and currently has 25 free trade agreements in place worldwide, covering 36 countries.

European Economic Area (EEA): The EEA member states (being those of EFTA except for Switzerland) have in place an agreement with the EU to extend the single market of the EU to the EEA Member States. Effectively, the legislation of the "four freedoms" (free movement of goods, services, capital and persons) and other rules on competition and state aid, extend to the EEA Member States. The EEA Agreement does not cover other EU policies relating to the Common Agriculture and Fisheries Policy, Customs Union, Common Trade Policy. This may seem unattractive to the UK as they will not formally be involved in decision-making at the EU level, although they will have the right to input. To become a member of the EEA, the UK will have to become a member of EFTA (or remain in the EU).

Swiss Model: Switzerland is a member of EFTA, but not the EEA. It has, however, agreed numerous bilateral agreements with the EU in order to access the EU markets, and over 50% of Switzerland's exports are to the EU. It does have an agreement on the free movement of persons with the EU, and therefore had to introduce employment laws that are equivalent to those of the EU. Like the option of joining the EEA, this option may also seem unattractive to the UK. The UK may also be expected to adopt certain of the EU laws in order to have the benefit of trade agreements, without having a say in the drafting of those laws.



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"Anglosphere": One alternative to the above models that commentators have considered is a loose political union between English-speaking countries. This is unlikely to be a formal union like the EU. Supporters of this model believe there are common bonds of language, culture and values. This has not been adopted as a formal policy of any UK Government.

What happens next?



We will be keeping you up to date over the forthcoming months. If any of the above content resonates with you or your contacts and you would like to discuss this further, then do get in touch.

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