

BREXIT – LEGAL IMPLICATIONS

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Introduction

In this *Special Report*, we have briefly outlined some of the main legal implications of Brexit according to different models, including the European Economic Area (EEA) model.

In light of comments made by Theresa May, **it is unlikely that the EEA model will apply**. Nonetheless, the United Kingdom's position may evolve as negotiations with the European Union progress, and we therefore keep our assessment pertaining to the EEA model herein.

It should also be noted from the outset that, whilst the date of Brexit is currently set as 29 March 2019, this will most likely merely mark a move into the implementation/transition phase. Currently, it is broadly agreed that the implementation period will last between 21 and 24 months. It is also agreed that during this period some elements of the decoupling process will be introduced, while other elements, notably the reformulated rights of UK and EU citizens, will not come into effect until the implementation period is completed.

As with all aspects of the Brexit negotiations, the position is that “nothing is agreed until everything is agreed”. The implementation phase is therefore still a fluid concept, and great uncertainty remains over what it will in fact entail.

Litigation

Civil and Commercial Jurisdiction

- The United Kingdom currently applies the Recast Brussels Regulation¹ to issues of jurisdiction and enforcement of judgments.
- Post-Brexit, EU Treaties will not apply to the United Kingdom. This includes Article 288 TFEU, which provides for the direct application of EU Regulations—including the Recast Brussels Regulation.

- Option 1 – To continue benefitting from the Brussels Regulation, the United Kingdom would need an agreement with the EU Member States granting the United Kingdom a third state status. The likelihood of this happening will ultimately depend on the outcome of the Article 50 TEU negotiations.
- Option 2 – The United Kingdom could sign and ratify the Lugano II Convention,² which applies between the European Union, Norway, Switzerland and Iceland. However, this convention is only open to European Free Trade Association (EFTA) states or third states meeting certain conditions (e.g., *unanimous agreement* of the contracting parties—the European Union being one such party) (Article 72).
- Option 3 – Another option would be to enter into a new treaty tailored specifically to the United Kingdom (or concluding a series of bilateral agreements).
- Option 4 – The United Kingdom could rely on the continued application of the 1968 Brussels Convention (which was largely replaced by the 2001 Brussels Regulation)³. However, this instrument is outdated, and the scope of its geographical application is limited since none of the EU Member States which joined the European Union since 2004 have acceded to the Brussels Convention.

- The Hague Convention on Choice of Court Agreements has been entered into on behalf of the United Kingdom by the European Union. The United Kingdom will have to accede to the Convention following Brexit. No EU consent would be required.
- Once the United Kingdom accedes, the Convention will guarantee that exclusive jurisdiction clauses in favour of UK courts will continue to be respected in the European Union.
- Interim measures (e.g., injunctions or freezing orders) cannot be enforced under the Hague Convention, but

¹ Regulation (EU) No 1215/2012 of 12 December 2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters.

² Convention on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters.

³ 1968 Brussels Convention on jurisdiction and the enforcement of judgments in civil and commercial matters.

they can under the Recast Brussels Regulation. The United Kingdom will need to fill this gap.

Choice of Law

- Currently, Rome I⁴ and Rome II Regulations⁵, which provide that the court will uphold the parties' choice of law clause, apply. Both legal instruments will cease to have effect in the United Kingdom following Brexit.
- Common law rules are similar to the provisions of the Rome I Regulation, which governs contractual choice of law. An explicit choice of law clause will thus most likely be unaffected by Brexit.
- With regard to non-contractual liability, the United Kingdom could unilaterally convert the Rome II Regulation into domestic law. (It could also unilaterally apply the Rome I Regulation.)

References for a Preliminary Ruling

- Post-Brexit, UK courts will no longer qualify as "courts" within the meaning of Article 267 TFEU. As such, English courts will no longer be able to refer cases to the highest court of the European Union, the Court of Justice of the European Union (CJEU).
- Pending references from the United Kingdom may be declared devoid of purpose and hence inadmissible. A referring court is under a duty to withdraw a preliminary reference if that reference has become pointless because of some later event.⁶
 - The CJEU might declare that it lacks jurisdiction post-Brexit simply because the referring court would no longer be a court of a Member State.
- In the interim period pre-Brexit, it may become more difficult to persuade an English court to make a reference for a preliminary ruling.
 - The usual timetable for the determination of a preliminary reference is 15 months on average.

- According to the White Paper on Great Repeal Bill (formally known as the European Union (Withdrawal) Bill), historic CJEU case law is to be given the same binding, or precedent, status in UK courts as decisions of the UK Supreme Court.

Arbitration

- The enforcement regime is governed by the 1958 New York Convention, which will not be affected by Brexit.
- All EU Member States are parties to that Convention, which means that, post-Brexit, London-seated arbitration awards will continue to be recognised and enforced across the European Union (and in many other jurisdictions around the world).
- The United Kingdom's exit from the Recast Brussels Regulation will likely mean that UK courts will again be able to issue anti-suit injunctions to prevent parties from proceeding before courts of EU Member States in violation of arbitration agreements providing for a London seat (which they have been unable to do since the CJEU's decision in *West Tankers*⁷).
- Some commentators believe that London-seated arbitration may actually benefit from Brexit. English lawyers may turn to it as the best alternative to the English courts, and the ability of English courts to issue anti-suit injunctions may make London-seated arbitration more attractive than before.

Competition

Cartels/Antitrust

- **Substantive law:** Brexit will have limited effects on traditional antitrust cases.
 - Substantive competition law is basically the same in the European Union and United Kingdom.
 - There is a statutory requirement (Section 60 of the Competition Act 1998) to interpret the UK

⁴ Regulation (EC) No 593/2008 of the European Parliament and of the Council of 17 June 2008 on the law applicable to contractual obligations (Rome I).

⁵ REGULATION (EC) No 864/2007 OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL of 11 July 2007 on the law applicable to non-contractual obligations (Rome II).

⁶ Opinion of AG Warner of 12 December 1973 in Case 166/73 Rheinmühlen-Düsseldorf [1974] ECLI:EU:C:1973:162, pg 46.

⁷ Judgment of the CJEU of 10 February 2009 in Case 185/07 Allianz SpA [2009] ECLI:EU:C:2009:69.

competition rules in a manner consistent with case law of the CJEU (consistency principle).

- UK case law has developed consistently with EU law by virtue of Section 60.
- Post-Brexit, the consistency principle might be replaced with a softer duty, whereby UK authorities might “have regard” to EU law and precedent, at least in the short-term.
- Post-Brexit, a divergence between UK and EU interpretation of the law may occur.
- **Double investigations:** EU competition law will continue to apply to non-EU companies, including UK companies, whose activities have an effect within the EEA.
 - The number of cases with parallel investigations by both UK and EU authorities and parallel fining decisions is likely to increase.
 - This can lead to higher costs and risks for businesses.
 - There is a risk of diverging approaches and conflicting decisions.
- **Investigative powers:** The European Commission will no longer be able to conduct dawn raids in the United Kingdom without a cooperation agreement with the United Kingdom.
 - The Commission’s powers of investigation would be limited to making written requests for information.
- **Enforcer:** Enforcement of competition law in the United Kingdom would be the responsibility of the Competition and Markets Authority (CMA), which will only apply UK law post-Brexit.
- **Leniency:** Separate leniency applications in the United Kingdom and European Union will be necessary and will generate additional costs for businesses.
 - Cartel members will not be able to safeguard their position in national queues for leniency by submitting “short form” national applications in conjunction with a full EU application.
- **Cooperation:** Exit from the European Competition Network would likely limit the CMA’s ability to effectively cooperate and exchange information with other national competition authorities.
 - The United Kingdom may negotiate a competition cooperation agreement, but cooperation on the basis of such an agreement would not be as far reaching as the current arrangements.
- **Block exemptions:** A “parallel exemption” may no longer be available:
 - Under Section 10 of the Competition Act, agreements are deemed to comply with UK competition law if they meet the criteria of an EU block exemption. Post-Brexit, this automatic exemption will not apply.
 - The UK Government is likely to enact its own exemption rules.

Merger Control

- **EEA model:** If the United Kingdom joins the EEA, there will be a continuation of the one-stop-shop system for merger control purposes.
 - However, UK turnover would not be taken into account for the purpose of calculating whether a transaction has an “EU dimension”. This would push some transactions below the EU thresholds.
 - No merger filing has been made to the EFTA Surveillance Authority (ESA) to date, but this could change if the United Kingdom were to join the list of EEA/EFTA states, adding another large economy alongside that of Norway.
 - One of the conditions to trigger an “EFTA dimension” is individual turnover of more than EUR250 million in the territories of the EEA/EFTA states (comprising Norway, Iceland and Liechtenstein), with no more than two thirds of that turnover arising in one and the same EEA/EFTA state.
- **Non-EEA model:** If the United Kingdom does not join the EEA, separate merger control regimes would exist in the European Union and the United Kingdom.

- There will likely be many mergers which could qualify under both merger control regimes and will need to be assessed by both the European Commission and the CMA.
- This situation would not only run the risk of having conflicting approaches and decisions/remedies, but would also substantially increase the costs and administrative burden associated with such transactions.
- The CMA currently imposes a merger filing fee of between £40,000 and £160,000, depending on the turnover of the target company.
- **Greater protectionism:** Article 21 EUMR prevents governments of EEA Member States from applying national legislation to prohibit or impose remedies on mergers that are notifiable under the EUMR, unless they do so to protect legitimate public interests. This provision will no longer apply to the United Kingdom, and the UK Government will enjoy more freedom to block or impose conditions on mergers.
 - Theresa May (in her capacity as British Prime Minister) stated that the government should be capable of stepping in when foreign companies try to buy UK firms in certain key industries.
 - National Security and Infrastructure Investment Review: in October 2017, the UK Government issued a Green Paper proposing a reform of its merger control regime in light of foreign investment and national security in both the short and long term.
 - Short term: For (1) the military and dual-use sector and (2) parts of the advanced technology sector, the UK Government proposes to lower the turnover threshold from £70 million to £1 million and remove the current requirement for the merger to increase the share of supply to or over 25 per cent.
 - Long term: The UK Government proposes potential reforms including: (1) an expanded version of the “call-in” power to scrutinise a broader range of transactions for national security concerns within a voluntary notification regime; and/or (2) a mandatory notification regime for foreign investment into the provision of a focused set of “essential functions” in key parts of the economy (e.g., civil nuclear and defence sectors).
- The consultation ended on 9 January 2018.
- In relation to the short-term proposal, on 15 March 2018, the UK Government released draft guidance on the CMA’s approach to changes to the jurisdictional thresholds for UK merger control.
 - The UK Government proposes to amend the jurisdictional thresholds in section 23 of the Enterprise Act 2002 for changes in control over enterprises active in three defined sectors: (1) the development or production of items for military or military and civilian use, (2) quantum technology and (3) computing hardware.
 - Specifically, the turnover threshold applicable to such mergers will be reduced from £70 million to £1 million, and the share of supply test will be met where a merger involves a target Relevant Enterprise with 25 per cent or more share of supply of the relevant goods and services in the United Kingdom, as well as where the merger leads to an increase in the share of supply to, or above, this 25 per cent threshold, which is the current requirement.
 - The consultation ended on 12 April 2018.

State Aid

- Applicability of state aid rules post-Brexit:
 - **EEA model:** The United Kingdom would remain subject to the same EU competition and state aid rules as before, as they are replicated in the EEA Agreement.
 - **Tailor-made Free Trade Agreement (FTA) model:** The United Kingdom will likely have to agree to a certain level of state aid control. However, the United Kingdom would have to self-enforce the state aid rules.

- South Korea agreed to abide by EU state aid rules under its FTA with the European Union.
- The FTA between Ukraine and the European Union provides for a domestic Ukrainian state aid control system.
- **World Trade Organisation (WTO) model:** The United Kingdom will be bound by the WTO Agreement on Subsidies and Countervailing Measures (ASCM), which disciplines the use of subsidies and provides for remedies to counter the adverse effects of subsidies.
 - The ASCM has no domestic application, and a UK-wide State aid framework would be necessary.
- **Implications of non-applicability:** If the United Kingdom does not join the EEA, the UK Government may be able to assist British-based businesses by, for example, granting tax exemptions or issuing advantageous tax rulings. The United Kingdom may also reintroduce certain tax rules that have been held to be contrary to EU law (e.g., 1.5 per cent stamp duty charge on UK shares issued into clearing systems such as Euroclear, Clearstream and DTC).
- The EU (Withdrawal) Bill seeks to preserve Article 108(3) TFEU (standstill obligation).
 - On 2 February 2018, the House of Lords published its report on Brexit: Competition and State aid, calling on the UK Government to clarify what approval mechanism State aid would be subject to after Brexit.

Antitrust Damages Actions

- EU decisions will cease to have a binding effect on UK courts, and there will be some ambiguity about the extent to which UK courts will need to have regard to EU decisions.
 - Section 60(3) of the Competition Act 1998 stipulates that “The court must, in addition, have regard to any relevant decision or statement of the Commission.”
 - Claimants will be less incentivised to bring follow-on actions before a UK court.

- The UK regulations implementing the Directive on Antitrust Damages Actions⁸ entered into force on 9 March 2017. The regulations amend the terms of the existing UK Competition Act 1998.

Legal Privilege

- During investigations by the European Commission, only advice from external EU/EEA-qualified lawyers is privileged. Depending on Brexit negotiations, advice by UK-qualified lawyers may not be protected against disclosure to the Commission.
- UK-qualified lawyers will no longer be allowed to plead before the EU courts, whilst they could still represent clients in administrative proceedings before the European Commission (e.g., DG Competition, DG Trade).

Trade

WTO

- The United Kingdom will continue to be a member of the WTO, but it will be a member with no country-specific commitments.
 - All of Britain's schedules of commitments have been negotiated by the European Union, and these will cease to apply post-Brexit.
- It is unpredictable how long it will take the United Kingdom to negotiate trade deals afresh. It would only take one objection to hold up the talks, because the WTO takes decisions by a consensus, not through a majority vote. This has recently led the UK Government to acknowledge that it may not be possible for the United Kingdom to negotiate a standalone relationship with the WTO prior to the United Kingdom actually exiting the European Union. With a no-deal Brexit still held out as a possible conclusion, this would have uncertain ramifications on the United Kingdom's ability to trade after that date.
 - The European Union (and the United Kingdom) has around 20,000 products scheduled as subject to

⁸ Directive 2014/104/EU of 26 November 2014 on certain rules governing actions for damages under national law for infringements of the competition law provisions of the Member States and of the European Union.

customs duties upon importation, thousands of product standards and regulations, and extremely complicated limits on access to its services market.

- The European Union and the United Kingdom jointly presented their ideas about the disentanglement of the United Kingdom from EU commitments and schedules to the WTO in October 2017. The initial plans were met with opposition from, amongst others, the United States, New Zealand and Canada. Opposition from these countries has centred on the issue of dividing the pre-existing agricultural import quotas—an issue that strong agricultural nations feel will put them at a disadvantage.

Public Procurement

- **EEA model:** There will be no need for any substantive changes to the UK procurement legislation.
- **Non-EEA model:** It seems likely that the United Kingdom will want to maintain its membership in the WTO Government Procurement Agreement (GPA), because this will provide UK suppliers with access to the EU procurement markets, and also to the United States, Japan and Canada.
 - Access to the EU procurement markets would, however, be more restricted given that the scope of the GPA is narrower than the scope of the EU procurement directives and countries choose which sectors to include.
- EU public procurement laws are already implemented in UK legislation, and those rules would continue to apply until they are repealed or amended.
- The United Kingdom has only recently implemented new public procurement directives through domestic regulations, and it would seem highly unlikely that amending these would be a legislative priority.

Anti-Dumping

- No EU Member State maintains its own anti-dumping rules. Regulation 122/2009 lays down the EU anti-

dumping rules.⁹

- Post-Brexit, the United Kingdom will need to consider whether to adopt its own anti-dumping rules and set up a UK anti-dumping authority.

Export Controls and Trade Sanctions

- Because EU rules prevent dual-use items from leaving the EU customs territory without an export authorisation, it is likely that the United Kingdom will be added to an EU General Export Authorisation so that certain dual-use items can be exported to the United Kingdom without the need for individual licenses.
- European companies with a UK nexus are likely to become subject to parallel EU and UK sanctions. Although sanctions are expected to remain generally consistent in the near future, UK-specific deviations will probably occur over time.

Data Protection

- The General Data Protection Regulation (GDPR)¹⁰ will apply from 25 May 2018. Pre-Brexit, UK-based businesses will have to comply with the GDPR.
 - Even post-Brexit, the GDPR will apply to every business that offers goods and services to EU citizens or that monitors EU citizens' behaviour.
 - Post-Brexit, if the United Kingdom does not opt for the EEA model, it will need to adopt new national data protection laws or continue its reliance on the Data Protection Act 1998.
 - The Data Protection Bill would bring the GDPR and the Police and Criminal Justice Directive (PCJ) Directive into UK law.
- Post-Brexit, data transfers from the EEA to the United Kingdom are in principle prohibited without an

⁹ Council Regulation (EC) No 1225/2009 of 30 November 2009 on protection against dumped imports from countries not members of the European Community.

¹⁰ Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC (General Data Protection Regulation).

adequacy decision of the Commission unless appropriate safeguards (e.g., binding corporate rules, model clause agreements) are in place.

- In August 2017, the UK Government published a future partnership paper on the “exchange and protection of personal data” after Brexit, where it stated that it “wants to explore a UK-EU model for exchanging and protecting personal data, which could build on the existing adequacy model.”
- There is a risk that the Commission would not regard the United Kingdom as providing adequate protection.
 - The UK Government proposes to exclude the Charter of Fundamental Rights from “EU retained law” after Brexit.
- Something akin to the EU-US Privacy Shield is conceivable.
- Ireland and the United Kingdom have been regarded as popular locations for European hubs or data centres for processing data from all European offices of multinational companies because of the pragmatic, less process-oriented approach taken by their regulators. This may change post-Brexit.

Contract

- A pre-Brexit contract that includes a reference to the European Union as the territory which is covered by the contract (e.g., territorial scope of a joint venture, territorial grant in a licence) will need to be reviewed to see whether the United Kingdom is included in the territorial scope post-Brexit.
 - This will depend on the drafting of the contract and the applicable rules of interpretation.
 - A *force majeure* or material adverse change clause to terminate the contract may be triggered—a technical opportunity for a party looking for a reason to trigger termination.
- Employment and consumer protection laws currently incorporated by reference in contracts would likely be repealed or amended.

IP

Copyright

- Copyright is the least harmonised intellectual property right in the European Union.
- The European Commission has indicated that it wishes to harmonise copyright law as part of its Digital Single Market strategy and has indicated that a long-term goal may be the introduction of a single EU-wide copyright title under a single harmonised law, with a single EU-wide court jurisdiction.
- If the United Kingdom joins the EEA, it will retain EU copyright law, including any legislation that is introduced in the future in the European Union and incorporated into the EEA Agreement. Otherwise, divergence between the European and UK regimes is to be expected.
- Databases are a uniquely European intellectual property right that falls within the ambit of copyright.
 - The database right is only available to EEA nationals and nationals of those countries which the European Union regards as providing reciprocal protection.
 - If the United Kingdom does not become a member of the EEA, it will need specific legislation for UK nationals’ database rights to be recognised in the European Union.

Patents

- Post-Brexit, the United Kingdom will remain a signatory to the European Patent Convention that is independent of the European Union.
 - It will be still possible to make a central application with the European Patent Office (EPO).
 - When the unitary patent system comes into force (discussed below), the unified patent court will no longer have jurisdiction over European patents validated in the United Kingdom.
- The option for a European patent, which would have unitary effect (unitary patent), will be introduced and a Unified Patent Court (UPC) will be established.

- The unitary patent will be established by two Regulations¹¹ which entered into force on 20 January 2013 and which will be applicable from the date of the entry into force of the Agreement on a Unified Patent Court.
 - The Agreement on a Unified Patent Court was signed on 19 February 2013 and will enter into force as soon as 13 states, including specifically France, Germany and the United Kingdom,¹² have ratified it. So far, among the three countries that must ratify the Agreement, only France has done so.
 - The United Kingdom has confirmed that it intends to ratify the Agreement regardless of Brexit. The UPC is now expected to become operational in the latter half of 2018.
 - The participation of the United Kingdom in the unitary patent system will necessarily raise numerous practical questions, including the following:
 - Should London continue to be a seat of the Central Division of the UPC?
 - Should the UPC's judgments have effect with regard to the United Kingdom?
 - Should UK judges be allowed to serve as UPC judges, particularly in regional/local divisions outside of the United Kingdom?
 - What will be the fee regime?
 - These issues will have to be solved before the entry into force of the unitary patent system and the UPC.
- trade mark (EUTM) registered with the European Union Intellectual Property Office (EUIPO). EUTMs give protection in every EU Member State.
 - Post-Brexit, existing EUTMs would cease to cover the United Kingdom.
 - Trade mark proprietors wanting continued trade mark protection in the United Kingdom would have to obtain a national UK trade mark in addition to their EUTM. Presumably, transitional arrangements will be put into place; for instance, it is expected that the United Kingdom will allow EUTM owners to obtain a conversion of their EUTM applications and/or registrations into national UK trademark applications and/or registrations. Such national applications/registrations may be allowed to keep the original filing date of the EUTM. However, any re-application or registration is likely to incur a fee, which could be substantial for large portfolios.
 - New EUTM filings post-Brexit would not cover the United Kingdom. An applicant would have to apply for a separate UK national trade mark.
 - A EUTM that has only been used solely or primarily in the United Kingdom will have to be used elsewhere in the European Union to avoid the risk of revocation. The EUTM Regulation¹³ provides that a EUTM can be revoked where there has been no genuine use of the mark in the European Union for a continuous five-year period and there are no proper reasons for non-use.
 - If the WTO model was adopted, there would be no exhaustion rules. Parallel trade in and out of the United Kingdom could decline. This could result in price differentials.

Trade Marks

- Trade marks can be registered either at a national level at the intellectual property offices of EU countries, or at an EU level as a European Union

¹¹ Regulation (EU) No 1257/2012 of the European Parliament and of the Council implementing enhanced cooperation in the area of the creation of unitary patent protection; and Council regulation (EU) No 1260/2012 implementing enhanced cooperation in the area of the creation of unitary patent protection with regard to the applicable translation arrangements.

¹² The three Member States in which the highest number of European Patents had effect in 2011.

Designs

- Many of the issues raised above in relation to EUTMs would apply also to Registered Community Designs (RCDs).

¹³ Regulation (EU) 2015/2424 of 16 December 2015 amending Council Regulation (EC) No 207/2009 on the Community trade mark and Commission Regulation (EC) No 2868/95 implementing Council Regulation (EC) No 40/94 on the Community trade mark, and repealing Commission Regulation (EC) No 2869/95 on the fees payable to the Office for Harmonization in the Internal Market (Trade Marks and Designs).

Trade Secrets

- On 5 July 2016, the Directive on Trade Secrets¹⁴ came into force. Member States have to transpose the Directive into their national law by 9 June 2018.
- The proposal harmonises the definition of trade secrets in accordance with existing internationally binding standards. It also defines the relevant forms of misappropriation and clarifies that reverse engineering and parallel innovation must be guaranteed, given that trade secrets are not a form of exclusive intellectual property right.
- The United Kingdom is legally required to transpose the Directive because it will still be a member of the European Union.
- Even if it does not do so, the United Kingdom already has a well-developed law of confidence to protect trade secrets; therefore, no substantial impact on businesses is expected.

Exhaustion of Rights and Parallel Imports

- By virtue of the principle of exhaustion of rights, once a good covered by an IP right has been put into circulation in the EEA by or with the consent of the IP right holder, such good can circulate freely in the EEA, unless there are legitimate reasons to oppose its free circulation, such as where the condition of the good has been subsequently changed or impaired.
- If the United Kingdom joins the EEA, the rule of exhaustion of rights will not be affected.
- However, if the United Kingdom leaves the European Union without joining the EEA, the rule of exhaustion of rights will cease to apply with regard to products imported into, or exported from, the United Kingdom. A product placed on the market in the United Kingdom will no longer be freely imported into the EEA without the consent of the IP right holder and *vice versa*. As a result, parallel trade between the United Kingdom and the EEA countries might decrease.

¹⁴ Directive (EU) 2016/943 of the European Parliament and of the Council of 8 June 2016 on the protection of undisclosed know-how and business information (trade secrets) against their unlawful acquisition, use and disclosure.

Tax

Customs Union

- The United Kingdom would cease to be a part of the EU customs union, which prohibits customs duties on goods traded between EU Member States and which applies a wide set of common rules to imports and exports.
- There is the question of whether this would result in the re-introduction of customs duties for exports between the United Kingdom and the European Union.
- The United Kingdom could agree a new customs union with the European Union that covers substantially all trade in goods without cherry picking sectors.

VAT

- Value-added tax (VAT) has been harmonised within the European Union since 1977. EU VAT legislation is mainly based on directives, with the main one being the VAT Directive.¹⁵
- Post-Brexit, the United Kingdom will be free to introduce new VAT rates for certain goods or services.
- The risk of double taxation or double non-taxation may well incentivise the United Kingdom to keep its VAT system materially aligned with the European Union's.

Withholding Taxes

- The Parent-Subsidiary Directive¹⁶ removes withholding tax on dividends paid between associated companies within the European Union.
- The Interest and Royalties Directive¹⁷ eliminates withholding tax on interest and royalty payments

¹⁵ Council Directive 2006/112/EC of 28 November 2006 on the common system of value added tax.

¹⁶ Council Directive 2003/123/EC of 22 December 2003 amending Directive 90/435/EEC on the common system of taxation applicable in the case of parent companies and subsidiaries of different Member States.

¹⁷ Council Directive 2003/49/EC of 3 June 2003 on a common system of taxation applicable to interest and royalty payments made between associated companies of different Member States.

between associated companies within the European Union.

- Post-Brexit, EU subsidiaries would not be able to rely on these Directives to be able to pay dividends or interest to their UK holding companies free from withholding taxes.
- Relief under bilateral double tax treaties would be an alternative and in many cases would also eliminate withholding taxes entirely.

Societas Europaea

- The European Company (Societas Europaea or SE) is a type of public limited-liability company regulated under EU law.¹⁸
 - Since its introduction in 2004, more than 1,800 businesses have adopted the SE statute (Some 40 SEs are registered in the United Kingdom).
 - The SE remains the only company form that allows companies to transfer their registered office to any other Member State without liquidation¹⁹. This possibility is particularly attractive for holding companies.
 - Whilst the jurisprudence of the CJEU has opened the way for acceptance of the principle of separation of registered and head office in the European Union²⁰, there is a requirement that the registered office and the head office of an SE shall be located in the same Member State.
- During the interim period pre-Brexit, UK companies could convert to SE status and move their registered office to an EU Member State.

Digital Single Market

- Brexit may result in the United Kingdom being left out

¹⁸ Regulation 2157/2001 establishing the Statute for a European Company; and Directive 2001/86/EC supplementing the Statute with regard to the involvement of employees.

¹⁹ However the SE Statute requires that the head office is moved together with the registered office, which reduces the advantage.

²⁰ See cases Centros (C 212/97), Überseering (C 208/00), Inspire Art (C 167/01), SEVIC (C 411/03) and Cartesio (C 210/06).

of the European Digital Single Market where the free movement of goods, persons, services, capital and data is guaranteed.

- EU Commission officials have stated that the Digital Single Market project will continue as planned despite a Brexit.
- The United Kingdom could achieve objectives of the Digital Single Market that do not contain a reciprocal dimension through domestic legislation; however, a bilateral agreement with the European Union would be required to achieve other objectives.

Financial Sector

Passporting

- The Markets in Financial Instruments Directive (MiFID)²¹ gives banks in a Member State the ability to carry on business and provide services throughout Europe without obtaining a licence in each individual country (passporting).
 - The general passporting position is carried over into the second Markets in Financial Instruments Directive (MiFID II).
 - MiFID II became applicable law as of 3 January 2018.
- The nature and extent of any post-Brexit “passport” for UK-based firms will depend in large part on which model of relationship is agreed on between the United Kingdom and the European Union:
 - **EEA/Norwegian model:** Passporting arrangements included
 - **Swiss/Canadian model:** Depends on the negotiations
 - **WTO model:** No passporting rights of any kind
- In the scenario of no passporting arrangements, under MiFID II, and post-Brexit, the following

²¹ Directive 2004/39/EC of 21 April 2004 on markets in financial instruments amending Council Directives 85/611/EEC and 93/6/EEC; and Directive 2000/12/EC and repealing Council Directive 93/22/EEC.

ramifications can be expected:

- Retail clients:
 - A bank established in the United Kingdom will only be able to conduct regulated investment business with a retail client in a Member State if the bank has established a branch in that Member State.
 - In order to establish a branch, the Member State's authorities would need to be satisfied that the United Kingdom benefitted from adequate regulation in certain key areas, such as anti-money laundering and the countering of the financing of terrorism. Cooperation and tax arrangements would also need to be in place between the two countries. The United Kingdom should meet all these requirements post-Brexit.
- Professional clients:
 - A bank established in the United Kingdom seeking to do business with professional clients in a Member State will be able to do so without establishing a branch in that Member State as long as it is registered in a register maintained by the European Securities and Markets Authority (ESMA).
 - This is only possible where the third country regulatory regime is considered equivalent and a decision to this effect has been adopted by the European Commission (equivalence decision).
 - Until an equivalence decision can be obtained, UK-based firms lose their passports and therefore cannot deal with EU-based clients. To continue to do business, they would need to set up an EU subsidiary.

force on 3 July 2016.

- The MAR ensures that rules keep pace with market developments, such as new trading platforms, as well as new technologies, such as high frequency trading (HFT). The new Directive on Criminal Sanctions for Market Abuse (Market Abuse Directive) complements the MAR by requiring Member States to introduce common definitions of criminal offences of insider dealing and market manipulation, and to impose maximum criminal penalties for the most serious market abuse offences. Member States must make sure that such behaviour, including the manipulation of benchmarks, is a criminal offence.
- Going forward, the United Kingdom may have opportunities to provide more freedom to businesses in comparison with MAR, but, realistically, it is probable that the United Kingdom's regime will be substantially similar in the future, given that the European Union is likely to require a system comparable to MAR to access the EU single market.

Energy Sector

Emissions Trading System (ETS)

- The EU ETS, established in 2003, is the world's largest emissions trading market.²³
- If the United Kingdom did not participate in the EU ETS, transitional and linking arrangements would be required, which would be particularly important for companies holding a surplus of allowances.

Renewables

- In accordance with the Renewable Energy Directive²⁴, the United Kingdom set a target to achieve 15 per cent of its energy consumption from renewable sources by 2020.
- The Directive has already been transposed into UK national law.

Market Abuse

- The EU Market Abuse Regulation (MAR)²² came into

²² Regulation (EU) No 596/2014 of the European Parliament and of the Council of 16 April 2014 on market abuse (market abuse regulation) and repealing Directive 2003/6/EC of the European Parliament and of the Council and Commission Directives 2003/124/EC, 2003/125/EC and 2004/72/EC.

²³ Directive 2003/87/EC of the European Parliament and of the Council of 13 October 2003 establishing a scheme for greenhouse gas emission allowance trading within the Community and amending Council Directive 96/61/EC.

²⁴ Directive 2009/28/EC of the European Parliament and of the Council of 23 April 2009 on the promotion of the use of energy from renewable sources and amending and subsequently repealing Directives 2001/77/EC and 2003/30/EC.

- Post-Brexit, it is unlikely for the European Commission to take legal action and impose penalties. The United Kingdom is also unlikely to materially change its energy policy because its domestic legislation (Climate Change Act 2008) imposes even tougher requirements.

European Atomic Energy Community (EAEC or Euratom)

- Euratom was established by the 1957 Euratom Treaty²⁵, which governs the peaceful use of nuclear energy within the European Union.
- Theresa May's formal Article 50 notice delivered to Donald Tusk on 29 March 2016 confirms the United Kingdom's intention to leave the Euratom.
 - The United Kingdom will have to negotiate new international arrangements with the United States and other countries in order to maintain access to nuclear power technology.
 - In a statement to the UK parliament on 12 July 2017, the UK First Secretary of State stated that the ability of UK cancer patients to access medical isotopes produced in Europe would not be affected by the intention to leave Euratom on the basis that Euratom places no restrictions on the export of medical isotopes to countries outside the European Union. It has not been confirmed what regulatory framework will be put in place to replace the United Kingdom's involvement in Euratom.

UK Access to EU Agencies

- The United Kingdom's continued access to a number of regulatory agencies and community projects following Brexit is still undecided. Whilst these agencies are not explicit organs of the EU Legislature, they have close ties to the community and there is currently limited access available to third parties.
- The European Medicines Agency (EMA) and European Banking Authority (EBA) are to be relocated from London to Amsterdam and Paris respectively.

Space Industry

- On 26 March 2018 the European Commission released a statement suggesting that the United Kingdom's continued involvement in the Galileo and Copernicus satellite projects was likely to be a contentious issue. In particular, the Commission stated that it had serious concerns over the third-party access to the project and how this would affect security.
- On 27 March 2018 Airbus responded and heavily criticised the Commission's stance on this point by stating that the United Kingdom's continued involvement in the project was critical to its success, as it is one of only two European nations with world class defence and space capabilities. It is still an open matter how these issues will be dealt with going forward.

Aerospace Industry

- The United Kingdom's access to the European Aviation Safety Authority is likely to be a point that arises at the negotiating table. The Authority's central certification system allows for ease of regulatory compliance within European airspace. There is precedent here for third-party access to the Authority, with Switzerland making use of membership to enable its own national authorities to issue safety compliance certificates and for its national courts to settle contentious matters rather than having to refer issues to the CJEU.

Pharmaceutical Industry

- It is likely that the European Union and the United Kingdom will wish to move towards a relationship going forward that very closely matches the current one. This will give the European Union access to the United Kingdom's world-leading universities and laboratories, and will provide the United Kingdom access to a larger selling market. Both of these factors should combine to provide for the faster and more effective introduction of new medicines into both the United Kingdom and the European Union.

²⁵ Treaty establishing the European Atomic Energy Community (2012/C 327/01).

Ongoing Developments

Prime Minister's Brexit Speech on 17 January 2016

- On 17 January 2016, UK Prime Minister Theresa May gave her first speech on the United Kingdom's strategy to leave the European Union.
- The speech confirmed that the government is currently aiming for "hard Brexit", as not leaving the European single market would mean "not leaving the EU at all."
- Parliament will get to vote on the final deal agreed between the United Kingdom and the European Union. It is expected that such a vote could take place in both Houses of Parliament (as well as the European Council) sometime in late 2018 or early 2019.
- The United Kingdom's priorities during the negotiations will be as follows:
 - Maintaining the common travel area between the United Kingdom and Irish Republic
 - Tariff-free trade with the European Union
 - A customs agreement with the European Union
 - New trade agreements with countries outside the European Union
 - Continued "practical" sharing of intelligence and policing information
 - "Control" of immigration rights for EU citizens in the United Kingdom and UK citizens in the European Union
 - A "phased approach"

Trigger of Article 50

- Theresa May signed the United Kingdom's official letter of its intention to leave the European Union on 28 March 2017.
- The letter was delivered to the president of the European Council, Donald Tusk, on 29 March 2017,

officially triggering Article 50.

- The result of the UK general election on 8 June 2017 means that the governing Conservative Party currently operates as a minority government and will rely upon the support of other political parties (primarily the Democratic Unionist Party) to pass legislation in the UK Parliament. No significant delay or change in position has arisen so far as a result of the minority government.

CJEU Opinion

- On 6 May 2017, the CJEU rendered a landmark Opinion in connection with an FTA between the European Union and Singapore.²⁶
- In this Opinion, the CJEU held that the European Union has exclusive competence in all aspects of the agreement, except for two aspects related to non-direct foreign investment and a dispute settlement regime between investors and Member States.
- In accordance with this Opinion, most aspects of the UK-EU deal would only need to be approved by a qualified majority in the Council, although the deal's scope is anticipated to be much broader than that of the FTA between the European Union and Singapore.
- The United Kingdom could also at least consider carving out fields for which unanimity is required in order to speed up the negotiation process.

European Union (Withdrawal) Bill

- On 13 July 2017, the UK Government introduced the European Union (Withdrawal) Bill (more usually referred to as the Great Repeal Bill) to the UK Parliament.
- The next stage is for the Bill to pass through the upper house of the UK Parliament, the House of Lords, before finally receiving Royal Assent and passing into law. The intention is that Royal Assent will be granted in spring 2018, meaning that the Bill will become law.
- Within the United Kingdom, criticism has been levelled at the Bill's proposed mechanism for the

²⁶ Opinion 2/15 of the CJEU (ECLI:EU:C:2017:376).

United Kingdom's exit from the European Union. Section 9 of the Bill grants what some people see as a troublesome level of autonomy to the UK Government (rather than involving the UK Parliament). As currently drafted, section 9 would allow the UK Government to use wide powers to negotiate with the European Union without full political scrutiny. The question on the table concerns whether the UK Parliament will get to vote on and alter the final terms of any agreement reached between the United Kingdom and the European Union before the implementation.

Possible CJEU Involvement in Resolving Disputes over Implementation of the Brexit Deal

- In January 2018, it was reported that the European Union and the United Kingdom might agree to use a preliminary ruling mechanism to resolve disputes over the implementation of the Brexit deal.

Negotiations

- At a European Parliament plenary session on 17 May 2017, Donald Tusk presented the Brexit negotiation guidelines adopted at the Special European Council Summit on 29 April 2017.
- The General Affairs Council authorised the opening of the negotiations on 22 May 2017. Discussions between remaining 27 EU Member States and the United Kingdom commenced on 19 June 2017.

Phase 1 Negotiations

- On 8 December 2017, the UK Government and EU negotiators presented a joint report to the European Commission setting out negotiated positions on three key "divorce issues". These issues centred on EU and UK citizens' rights following Brexit, the Ireland/Northern Ireland border question, and the bill to be paid by the United Kingdom on exit. There is still scope for these points to be revisited and altered as part of ongoing negotiations

- EU citizens and UK citizens who have exercised their free movement rights up until Brexit will have the right to stay in the country to which they moved.
- These rights are extended to the citizens' family members, who will be allowed to join their relatives resident in the United Kingdom or European Union on the same conditions as under current EU law, even after Brexit. The United Kingdom and the European Union will also facilitate entry and residence of citizens' partners in a durable relationship.
- EU citizens living in the United Kingdom will have their rights enshrined in UK law and enforced by British courts. EU law will have to be interpreted in line with EU case law, and the EU courts will remain the ultimate arbiter of the interpretation of EU law for eight years after withdrawal.

IRELAND/NORTHERN IRELAND BORDER QUESTION

- Although the report largely failed to reach a conclusion on the finer details of the border issue, it was made clear that the intention of both parties is to retain what has been termed a "soft border" between Ireland and Northern Ireland. This soft border would have the same characteristics as are currently in existence, *i.e.*, the conditions put in place by the Good Friday Agreement in 1998.
- One aspect of the Good Friday Agreement that both parties have assured will remain in place is the right of Northern Irish citizens to choose between Irish, British or both nationalities. Post-Brexit this could mean that Northern Irish citizens may retain the right to opt into EU citizenship if they so wish.
- Further assurances were also made that the Common Travel Area between Ireland and Northern Ireland would remain in force post-Brexit. This creates the predicament of how Northern Ireland will fit into the trade, compliance and regulatory regimes which will remain necessary in Ireland. We await the outcome of further negotiations on this point.

CITIZENS' RIGHTS

THE FINANCIAL SETTLEMENT

- A methodology for calculating the United Kingdom's final financial settlement was agreed by both parties and has now been submitted for further approval.
- Under the proposed methodology, the UK will continue to perform its duties under the budgets already set out for the period up to 2020 as if it had remained in the European Union.
- Initial predictions forwarded by the UK Government suggest that the final figure is likely to be £39 billion, although there has been much speculation around this figure, with some sources suggesting a figure as high as £100 billion.

Theresa May's Mansion House Speech

- On 2 March 2018 UK Prime Minister Theresa May noted that no existing form of third-party relationship with the European Union would be acceptable to the United Kingdom. "We will not accept the restricted rights of Canada or the obligations of Norway".
- The Prime Minister maintained that it would be unacceptable for the United Kingdom to break up its internal customs union by a division of customs regulation which would treat Northern Ireland separately to the rest of the United Kingdom.

The Draft Withdrawal Agreement

- On 19 March 2018 the UK Government and the European Commission published a draft withdrawal agreement which includes the legal text agreed by the negotiators on the post-Brexit transition period.
- It has now been agreed that the transition period will end on the 31 December 2020.
- Most notably the draft clarifies the steps that the United Kingdom may take towards establishing new international agreements during the transition period. In particular the draft text provides that during this transition period, the United Kingdom "may negotiate, sign and ratify international agreements" in its own capacity, including in areas of exclusive EU competence "provided those agreements do not enter into force or apply during the transition period" unless authorized by the European Union.

Taxation (Cross-Border Trade) Bill

- In preparation for the United Kingdom's withdrawal from the EU Customs Union, the United Kingdom will have to implement new legislation to organise the effective running of its own separate customs area. This legislation is currently passing through the UK Parliament in the form of the Taxation (Cross-Border Trade) Bill.
- The main aim of the Taxation (Cross-Border Trade) Bill is to decouple the UK VAT, customs and excise regimes from those of the European Union. Of particular note is the proposition that the concept of acquisition VAT will be discarded and replaced with the charging of import VAT on all imports, irrespective of their country of origin. This particular provision has caused concern among small business owners who believe that this different charging provision is likely to affect cash flow.
- It should be noted that the Taxation (Cross-Border Trade) Bill is at present drafted with broad powers of amendment. The reasoning is that these powers allow the Bill to be tailored to best fit the eventual shape of Brexit. In particular, wide-ranging powers have been included which allow the UK Government to enter into customs agreements (including the ability to opt back into the EU's Customs Union in a variety of different ways).

The Gibraltar Question

- On 5 April 2018 the UK Government published an update for the House of Commons Library relating to the questions surrounding Gibraltar's treatment following Brexit. This was published in the wake of the EU27's view that the draft Withdrawal Agreement did not consider properly the treatment of Gibraltar (which is a British territory located within the European Union).
- Currently, there is no bilateral agreement between the United Kingdom and Spain on the issues that arise in relation to Gibraltar. It is a concern of the UK Government that the Spanish Government may use powers granted by the EU27 negotiating guidelines to force issues of sovereignty surrounding Gibraltar. This has been a long-standing contentious issue between the two nations.

- The likely solution to these issues appears to be the creation of a separate protocol alongside the Withdrawal Agreement in respect of Gibraltar. Protocols of this sort have already been drafted, but not yet agreed, in respect of Northern Ireland and the UK sovereign bases located in Cyprus. It is unclear at this time what shape this protocol may take.

Legal Challenge

- A crowd-funded legal challenge currently is progressing through the UK legal system which seeks to challenge the giving of the Article 50 notification by the UK Government. The claim (which is supported by donations from individuals who are being represented by Geldards LLP) is requesting the UK courts to determine whether the Article 50 notice was properly given. Their core argument is that the UK referendum was advisory only (*i.e.*, it did not have automatic legal effect) and that the UK Parliament did not technically include an appropriate decision to leave the European Union. The legal challenge is on the basis that the UK Parliament gave authority to issue the Article 50 notification without technically making its own withdrawal decision. An application on this basis was made to the UK High Court in December 2017, and permission was initially refused on the grounds that the claim should have been issued within three months of the Article 50 notice being delivered to the European Union. However, permission has now been granted for an oral hearing to take place in June 2018 to see if the claim can progress any further. Most legal commentators expect that the claim will not be successful (primarily because the UK courts seem likely to find that the claim was not brought within sufficient time).

Next Steps

Date	Event
October 2018	Date by which the European Commission's Brexit negotiator suggested that Article 50 exit negotiations should be concluded to allow time for ratification of the withdrawal agreement.
29 March 2019	Deadline for conclusion of the Article 50 withdrawal agreement (unless all Member States agree to an extension).
30 March 2019	First day the United Kingdom is no longer in the European Union. If a withdrawal agreement is reached by the end of the negotiating period (all indications at present are that there will be an agreement, though its nature is still uncertain on many points), it will likely come into force on this day.
29 December 2020 / 29 March 2021	Likely end of the Implementation Period. This is still subject to ongoing discussion and nothing has yet solidified on this point.

Annex: Overview of Possible Exit Models

	Current position	Norway option (EEA)	Swiss option	Turkish option	FTA option (Canada)	WTO option (Closest to Hard Brexit)
Full access to Single Market	✓	✓	✗	✗	✗	✗
Some Single Market access	✓	✓	✓	✓	✓	✗
Single Market access for financial services	✓	✓ ²⁷	✗	✗	?	✗
Free movement of people	✓	✓	✓	✗	✗	✗
EU trade agreements with rest of world	✓	✗	✗	*28	✗	✗
No EU budget contributions	✗	✗	✗	✓	✓	✓
Free to trade with EU without complying with EU law	✗	✗	✗	✗	✗	✗

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²⁷ However, the EEA agreement does not cover the increasingly important work of the European Supervisory Authorities.

²⁸ Turkish arrangement includes goods for which the EU negotiates trade agreements and Turkey needs to impose EU-set common tariffs for imports of goods from outside the customs union. Turkey may freely negotiate trade deals regarding services.

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