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# THE DAY AFTER BREXIT:

## WHAT WILL HAPPEN IF BRITAIN VOTES TO LEAVE THE EU?

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# THE DAY AFTER BREXIT: WHAT WILL HAPPEN IF BRITAIN VOTES TO LEAVE THE EU?

**A legal and regulatory analysis of the possible implications of British departure from the European Union**

On 23 June 2016, the UK electorate will answer a simple question:

*"Should the United Kingdom remain a member of the European Union or leave the European Union?"*

What will happen if a majority votes to leave the European Union? What would happen next, and when? What, if anything, should businesses be doing now?

To answer these questions, it is necessary to understand the UK's current relationship with the other members of the EU and the range of new relationships that are potentially open to the UK if it leaves. These relationships vary across sectors and the consequences of leaving will vary similarly. The EU is founded on laws, and any new relationship will also be legally based. The legal analysis is therefore fundamental.

This briefing examines what would happen after a UK vote to leave the EU in terms of UK domestic law, the EU's own requirements and the timetable of the exit process. We examine the alternatives to EU membership from an institutional and legal perspective, including an analysis of how they would impact goods and services generally. We then examine financial services, migration, employment law, tax, competition law, data protection, intellectual property, commercial contracts and related issues, trade relationships with non-EU members, environment and climate change law and other issues. Finally, we look at what businesses should be doing now.

This briefing is intended to consider the legal and regulatory implications of the UK leaving the EU – the question of whether the UK should leave or remain in the EU is beyond the scope of this briefing, which does not seek to address that question.

The answer to the initial question – what will happen on the day after a vote for Brexit – is nothing, initially. The UK will still be a member of the EU on 24 June 2016 whatever the outcome of the vote. But following a vote to leave, the UK government will initiate a procedure leading to the UK's withdrawal from the EU and, ultimately, to the establishment of a new relationship with its former EU partners. What this will look like and when it will come about raises much more complex issues.

## Executive summary

A vote to leave the EU on 23 June would start a long and complicated process that would result in a fundamental change in the UK's relationship with the other members of the EU. It may not be clear what would replace the UK's current relationship for some time.

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**Malcolm Sweeting**, Senior Partner

Following a vote to leave the EU, the government has said the UK would serve its notice to withdraw under Article 50 of the Treaty on European Union (although the Referendum is not binding and the timing of any notice is uncertain), which envisages a two year negotiation of a withdrawal agreement. This could be extended by mutual agreement, but in the event of no agreement and no extension, the UK would cease to be a member after that two year period. If a withdrawal agreement were reached, a more comprehensive agreement between the UK and the Continuing EU (C-EU) would likely be forthcoming.

The UK could seek to become a member of the European Economic Area (EEA) and European Free Trade Area (EFTA) like Norway; reach a series of bilateral agreements like Switzerland; agree a Free Trade Agreement (FTA); join the EU customs union like Turkey; or rely on its World Trade Organisation (WTO) membership.

The key mechanism for the cross-border provision of **financial services** within the EU (and EEA) are the various passports under the EU single market directives. **Financial services** would in principle therefore be least impacted if the UK were to join the EEA, however it is important to bear in mind that the EEA has not yet fully been able to deal with the implications of the advent of the European Supervisory Authorities (ESAs) in 2010. The other options provide very limited access in terms of financial services, largely due to the so called "prudential carve out" whereby countries reserve the right to regulate their financial sectors for prudential and other reasons.

In relation to **migration**, there are currently large numbers of EU nationals working in the UK, and vice versa, in a range of sectors, including financial services. A priority of any withdrawal agreement between the UK and the EU would be to address the right (or otherwise) of these workers to continue in their present jobs. A "grandfathering" system for current workers seems the most likely solution, whether from the date of the UK referendum or Brexit itself. New arrangements would be required for migration once Brexit occured.

A significant portion of UK **employment law** is derived from EU law, including the legislation that governs maternity and paternity leave, agency workers' rights, paid holiday and the protection of employment upon the transfer of a business. However, that law does not in the main depend upon the UK's continuing membership of the EU. It could continue in place until the UK chose to change it, to the extent that the UK's continuing relationship with the EU allowed the UK to depart from EU employment requirements.

The power to levy direct **taxes** is generally a matter for the EU's member states, with only limited EU competence in the area. However, the right to tax must be exercised in a manner that is consistent with the EU's treaties. Under the EEA agreement it is not permitted to use tax policy as a means to discriminate, directly or indirectly, against products from other members. Otherwise, depending on the terms of any agreement with the EU, the UK would have significantly more ability to shape its own tax laws, but would lose the tax coordination elements of EU membership.

The UK's domestic legislation, principally the **Competition** Act 1998 and Enterprise Act 2002, largely mirrors EU legislation for competition issues within the UK, and is likely

"Following a leave vote, the government has said the UK would engage Article 50, although the timing would be uncertain. In the event of no agreement and no extension to the envisaged two year negotiating period, the UK's membership of the EU would lapse."

**Phillip Souta**, Head of UK Public Policy to remain in force even if the UK leaves the EU. However there is the possibility that UK enforcement practices in relation to mergers may diverge from those of the EU. This could add an extra element of risk to mergers of businesses that operate in the UK and in the EU given the requirement for approval in an extra jurisdiction.

UK **data protection** law implements an EU regime which would be changing to impose higher standards in parallel with the Brexit process – the new enhanced regime is due to take effect in 2018. This would continue if the UK stayed in the EEA. Outside the EEA the UK would have the option of implementing a more light-touch regime, potentially less burdensome for business, but this would risk the imposition of restrictions on flows of data from the EU to the UK. It is likely that the UK would want to be regarded as an "adequate" destination for personal data transferred from the EU, as is, for example, Switzerland.

Various **intellectual property** rights cover the whole EU through a single unitary right, for example European Union trade marks (EUTM) and EU designs. These rights co-exist with nationally granted rights in individual EU member states. There is no precedent for what happens when an EU member state leaves. The UK would in all likelihood be removed from the protection given by the EUTM and other unitary rights. The thousands of brandowners and other rightholders around the world who protect their rights in Europe via the EUTM and other unitary systems will then be at risk of being deprived of protection in the UK if they do not have equivalent national rights in the UK. Potentially, the UK could allow for some form of automatic or optional national right reflecting the previous EUTM protection.

Brexit may have practical implications for relations under **commercial contracts**, though it is likely to be at least two years after the referendum before Brexit occurs, which will give the parties time to reach a consensus as to the position after Brexit. Parties' choice of governing law is unlikely to be affected by Brexit. The jurisdiction of the courts and the mutual enforcement of judgments between the UK and the EU could be directly affected by Brexit because this depends in large part on the Brussels I Regulation on jurisdiction and the enforcement of judgments in civil and commercial matters.

In the case of existing **trade agreements**, there will be uncertainty whether these agreements would continue between the UK and the other (non-EU) contracting parties. The UK and the counterparty could agree that the agreements should continue on the same terms or subject to certain modifications.

A great deal of current UK **environmental law** derives from EU legislation. Following Brexit, the UK could decide to change legislation but compliance with at least some EU legislation would be required to maintain the UK's environmental trading relationship with the EU.

**Box 1:**

**What should businesses be doing now?** Businesses are increasingly considering conducting scenario and contingency planning. It is especially relevant for financial institutions which currently take advantage of passporting from the UK to other EU member states.

**What about referendum law, political donations, and expenditure by firms?** Any money or support that businesses give to either side of the campaign could be a political donation covered by the Companies Act 2006 and Political Parties, Elections and Referendums Act 2000.

There are any number of **other issues** that would arise from a UK departure from the EU, for example the UK would no longer take part in the EU's Common Agricultural Policy (CAP) or Common Fisheries Policy (CFP) and the UK would be able to pursue a justice and home affairs policy independent of the EU, which would mean no longer taking part in such initiatives as the European Arrest Warrant.

## The UK has voted to leave: what happens next?

On the day after a vote to leave the EU, the UK will still be a member of the EU. Nothing in the European Union Referendum Act 2015, under which the referendum is taking place, or elsewhere in UK law, gives the result automatic effect.

### UK domestic law

To bring about the UK's departure from the EU as a matter of domestic law, primary legislation would be required. This would involve the repeal or amendment of the European Communities Act 1972, accompanied by a decision in relation to what elements of current UK law that are derived from EU law should remain and what should be repealed, amended or replaced. Given the volume of EU-derived laws applicable in the UK, the easiest path will be to leave much, perhaps most, of that law in being initially, but then to replace or amend elements of it as the need arises and legislative capacity allows. The UK's consumer protection laws, employment laws and so on may be as they are because of the obligations of EU membership, but they do not in the main depend on the UK's continuing to be a member of the EU in order to operate effectively. Some legislative change at the time of Brexit would still be required even on this approach: for example, if the UK ceased to be a member of the EEA, the approximately 525 references to "EEA firms" and "EEA states" in the Financial Services and Markets Act 2000 would need to be considered and potentially amended.

It is very unlikely that the UK would go down the path of unilateral withdrawal by repealing the European Communities Act 1972 immediately after the Brexit vote because that would contravene the UK's international obligations to the remaining members of the EU and would in all likelihood remove for many years any hope of a constructive continuing relationship with the EU. The internal timetable for withdrawal would need to match the schedule required by EU law.

### EU legal requirements for withdrawal

Withdrawal from the EU is covered by article 50 of the Treaty on European Union (see Box 2). This provides that a member state "which decides to withdraw shall notify the European Council of its intention". In practice, the Prime Minister would write to the President of the European Council, Donald Tusk, formally notifying the Council of the outcome of the referendum and of the UK's decision to withdraw from the EU. It is likely that a notice of withdrawal from the EU could itself be withdrawn before the notice took effect in accordance with the timing discussed below, potentially allowing for a change of mind on the UK's part.

Following this notification, article 50 states that the EU "shall negotiate and conclude an agreement with [the withdrawing] State, setting out the arrangements for its withdrawal, taking account of the framework for its future relationship with the Union." An agreement made under article 50 requires the approval of a qualified majority of EU member states (excluding the UK) within the European Council and the consent of the European Parliament (including, it seems, UK MEPs).

The article 50 agreement will cover the "arrangements for... withdrawal", but this seems to be separate from any agreement covering "the framework for [the UK's] future relationship with the Union", albeit that the former must be taken into account in the latter. If this agreement on future relations is confined to trade issues, it could be entered into by the EU under article 207 of the TFEU, which also requires a qualified majority on the Council; but if the agreement goes beyond trade, it would require unanimity amongst the EU's continuing member states. Indeed, there could ultimately a number of agreements – an initial withdrawal agreement, a more comprehensive trade agreement and an agreement covering other non-trade matters, e.g. security cooperation.

The exit of the UK from the EU would require some changes to the Treaties to eliminate references specific to the UK. As a net contributor to the budget, the contributions of other net contributors would either have to be increased or the C-EU would need to make cuts to existing or future C-EU programmes. The status of UK nationals working in C-EU institutions would also need to be addressed, as would the fate of C-EU agencies headquartered in the UK.

**The timing of withdrawal**

Article 50 of the TEU provides that the EU's treaties will stop applying to a withdrawing state when a withdrawal agreement enters into force or, failing that, two years after notification of the decision to withdraw. Reaching a withdrawal agreement and a relationship agreement within this two year period is ambitious given the complexities involved – for example, following Switzerland's rejection of EEA membership in 1992, it took from 1994 to 1999 to negotiate its initial bilateral arrangements with the EU, which did not then come into force until 2002. It is possible for the continuing members of the EU and the UK to agree unanimously to extend this two year period or, perhaps, to reach a withdrawal agreement together with an interim agreement on future relations, leaving some, or most, of the details for further negotiation and future agreement.

The areas on which agreement will be needed vary from the transitional and pragmatic to the long-term and principled. Transitional issues – likely to be the subject of the withdrawal agreement – include the status of UK citizens already living or working in other EU member states and vice versa, the fate of UK court cases already within the EU system and the effect of any change in law as a result of Brexit on existing transactions. The remainder of this briefing is largely concerned with the more difficult issues around the longer term relations between the UK and the EU.

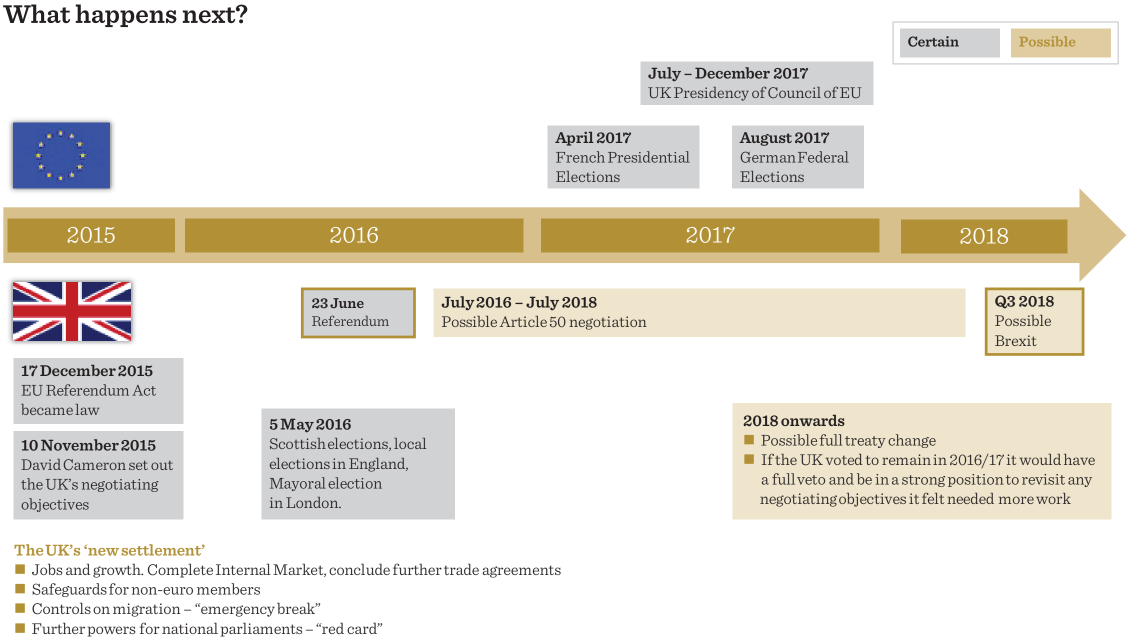
Absent either an extension of time or a withdrawal agreement, the departure of UK from the EU would occur two years after notification under article 50.

The negotiation of the UK's exit from the EU could be complicated by the Scottish National Party's indication that, if the UK as a whole were to vote to leave the EU but Scotland were to vote to remain, it would press for another vote on Scottish independence. In those circumstances, there is a possibility of a referendum on Scottish independence taking place while the UK was negotiating its withdrawal from the EU followed by, depending on the outcome of that referendum, parallel negotiations for the UK to leave the EU, for Scotland to leave the UK and for Scotland to join the EU.

"Reaching a withdrawal agreement and a relationship agreement within this two year period is ambitious given the complexities involved."

**Michel Petite**, Avocat of Counsel

## What happens next?




### Box 2

### The EU's exit clause – article 50 of the Treaty on European Union

### Article 50

1. Any Member State may decide to withdraw from the Union in accordance with its own constitutional requirements.

2. A Member State which decides to withdraw shall notify the European Council of its intention. In the light of the guidelines provided by the European Council, the Union shall negotiate and conclude an agreement with that State, setting out the arrangements for its withdrawal, taking account of the framework for its future relationship with the Union. That agreement shall be negotiated in accordance with Article 218(3) of the Treaty on the Functioning of the European Union. It shall be concluded on behalf of the Union by the Council, acting by a qualified majority, after obtaining the consent of the European Parliament.

3. The Treaties shall cease to apply to the State in question from the date of entry into force of the withdrawal agreement or, failing that, two years after the notification referred to in paragraph 2, unless the European Council, in agreement with the Member State concerned, unanimously decides to extend this period.

4. For the purposes of paragraphs 2 and 3, the member of the European Council or of the Council representing the withdrawing Member State shall not participate in the discussions of the European Council or Council or in decisions concerning it.

5. A qualified majority shall be defined in accordance with Article 238(3)(b) of the Treaty on the Functioning of the European Union.

6. If a State which has withdrawn from the Union asks to rejoin, its request shall be subject to the procedure referred to in Article 49.

## What are the alternatives to EU membership?

The arrangements between the EU's members are complex and far-reaching. They cover the so-called "four freedoms" (see Box 3) of the internal market – freedom of movement of goods, services, capital and persons – but also provide for a customs union as well as rules dealing with agriculture and fisheries, a common external trade policy, common foreign and security policy, justice and home affairs, monetary union and so on. The UK currently has exemptions from some of these areas, and the deal agreed between the UK and the other EU members of 19 February 2016 provided for further special arrangements for the UK to come into effect in the event of the UK voting to remain in the EU.

The question for the UK is what elements of the current relationship with the EU it wishes to keep, and the question for the EU is what elements of this relationship is it prepared to allow the UK to keep without the UK's subscribing to the full package. The UK's primary goal is likely to be to retain full, or as full as possible, access to the EU's internal market.

There are five broad models for the relationship between the EU and the UK (see Box 4) which are discussed in further detail below. The first model (EEA membership) can be defined with reasonable precision because it already exists. Each of the other models involves considerable uncertainty because it depends upon the outcome of the negotiations between the UK and the EU. No one can know what the negotiations will achieve, or even what political and other events will influence negotiating positions and outcomes. For example, French Presidential elections are scheduled to take place by May 2017 and German Federal elections by October 2017.

It is very likely that the UK will need to decide quickly what form of relationship with the EU it would like since this decision will dictate the scope and nature of the negotiations. In his Bloomberg speech of January 2013 and again at

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**Simon James**, Partner

**Box 3**

**The "four freedoms"**

| The "four freedoms" | | | |
|---|---|---|---|
| **Goods** | **Persons** | **Services** | **Capital** |
| Customs duties (arts 28-30 TFEU) | Free movement of citizens (Art. 20-21 TFEU) | Freedom of Establishment (Art. 49 TFEU) | Free movement of capital (Art. 63(1) TFEU) |
| Internal taxation (Art. 110 TFEU) | Free movement of workers (Art. 45 TFEU) | Freedom to provide, receive services (Art. 56 TFEU) | Free movement of Payments (Art. 63(2) TFEU) |
| Free movement of imports (Art. 34 TFEU) | | **Relevant law on** | |
| Free movement of exports (Art. 35 TFEU) | | ■ Banks (CRD IV)<br>■ Payment Systems (PSD)<br>■ Investment Services (MiFID; MiFIR)<br>■ E-Money (EMD)<br>■ Money Laundering (3 MLD) | |

Chatham House in November 2015, the Prime Minister appeared to dismiss the first two models (EEA and similar bilateral agreements, often referred to as the Norwegian and Swiss models respectively) largely because they involve the participants accepting EU rules but having no say in their creation. But in answer to a question at Chatham House, he then said that he ruled nothing out. The only certainty is uncertainty.

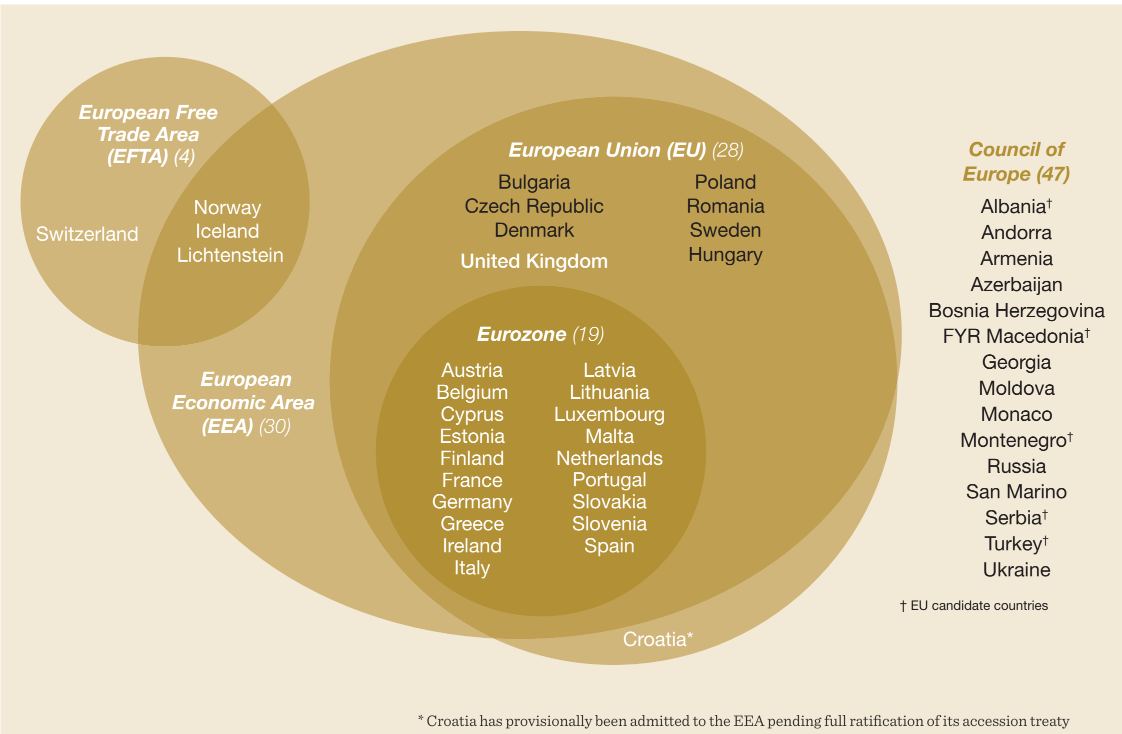
**Box 4**

**UK/EU relationships**

The five principal models for a future relationship between the EU and the UK are as follows:

- EEA, ie membership of EFTA and the EEA, like Norway. [Highly unlikely.]
- Bilateral arrangements with the EU, mirroring to a significant degree the EEA, like Switzerland. [Unlikely.]
- Customs union, like Turkey. [Highly unlikely.]
- Free trade agreement, like Canada. [Likely, over time.]
- WTO, relying solely on general international trading rules. [Unlikely.]

**The UK in Europe**




| British Crown Dependencies | EU Outermost Regions (OMRs) | EU overseas Countries & Territories (OCTs) | Other |
|---|---|---|---|
| Isle of man<br>Channel Islands (Jersey, Guernsey, Sark) | E.g. Martinique; Canary Islands | E.g. British Virgin Islands; Aruba | E.g. Gibraltar |

**The EEA**

Membership of the European Economic Area would grant the UK the highest level of access to the EU's internal market. The corollary of that is that the UK would be bound to comply with the EU's laws regarding the internal market.

The EEA comprises the members of the EU plus three of the four members of the European Free Trade Association, i.e. Norway, Iceland and Liechtenstein (whose population in aggregate is about 5.4 million, of which Norway comprises 5.1 million, or some 8% of the UK's population). These EEA members gain access to the EU's internal market and accordingly are subject to the rights and obligations associated with the four freedoms and to other EU rules related to the internal market (e.g. rules on competition, consumer legislation, environment and employment.) They also have to pay into the EU's social and economic cohesion funds. They have some decision-shaping powers regarding EU law, but no role in decision-making, i.e. they can offer views to the European Commission as to the content of any law that might be proposed, but they take no part in the EU's legislative procedures. The EEA's requirement that its members accept EU law has led to some 8,000 EU measures being incorporated into the EEA Agreement since the EEA came into being in 1994, including 627 in 2014 and 483 in 2015.

If the UK became a member of the EEA, the UK would have access to the EU internal market but would be outside of the EU's customs union. As such, the UK would have to comply with EU Rules of Origin, which are more complex than the current internal market arrangements and which do not distinguish between products from different member states within the EU. The UK would be free to negotiate its own trade treaties. The UK may not be able to take advantage of the terms of the EU's current 53 trade agreements – it would have to decide whether to seek to renegotiate or re-establish those on a bilateral basis, or join EFTA's trade treaties. The latter would likely be complicated by the fact that the EFTA's trade agreements were not negotiated with the UK's market access preferences in mind, and if the UK were to become a member of EFTA, the UK's accession to individual EFTA trade treaties would have to be agreed by the parties to those agreements (see for example Article 10.4 on 'accession' in the EFTA – Republic of Korea Free Trade Agreement.)

The EEA also has institutions that, to some extent, mirror the EU's. Since the EEA mirrors the laws made by the EU but does not participate in making them, it has no central administration of the character of the European Commission. However, the EFTA Surveillance Authority, based in Brussels (like the Commission), is charged with ensuring compliance with the EEA Agreement. There is also an EFTA Court, based in Luxembourg (like the CJEU), where disputes over compliance or between member states can be resolved.

The UK's route into full EEA membership is not entirely clear. The UK is currently a member of the EEA because all EU members are EEA members under the EEA Agreement. The EEA Agreement does not provide for automatic termination of EEA membership if a state leaves the EU. However, the EU is also a party to the EEA Agreement, and many of the benefits of EEA membership (specifically those within the EU's exclusive competence, like trade) may only accrue to EU members whilst they remain members. Departure from the EU may make the UK's status as regards the EEA unclear. The EEA Agreement provides that any member may withdraw by giving 12 months' notice of its intention to do so. The UK may have to withdraw, apply to join EFTA (which requires unanimity) and then apply to join the EEA, or at least conduct an extensive renegotiation of the EEA Agreement in order to return to the fold.

The EEA option is, in any event, unlikely to be politically acceptable to the UK if it decides to leave the EU. The UK would gain access to the EU's internal market without being subject, for example, to the EU's common trade policy, customs union or agriculture and fisheries policy. The price of access would be the need to comply with the majority of EU legislation but without the ability, which the UK currently has (whether through EU councils or ultimately by voting on the legislation), to legally participate in the making of legislation. It may be argued that this lack of overt sovereignty would undermine the purpose and effect of the UK's referendum vote.

**Bilateral agreements**

Switzerland signed its first bilateral agreement, a FTA covering industrial products, with the then European Economic Community, in 1972. It participated in the negotiation of the EEA Agreement, which it signed in May 1992, alongside the other three remaining EFTA members. Swiss voters rejected joining the EEA in a referendum in December 1992. Opponents of Swiss membership of the EEA argued that it would undermine Swiss sovereignty. In 1994, Switzerland started negotiations with the EU over some of the ground covered by the EEA Agreement. This led to the "Bilateral I Agreements" in 1999, which came into force in 2002. Negotiations on other sectors continued and, by 2010, there were around 210 trade treaties between the EU and Switzerland.

The bilateral agreements between Switzerland and the EU grant Switzerland, with its population of about 8.3 million, some, but not complete, access to the EU's single market (e.g. financial services are generally excluded) while, at the same time, affording Switzerland a more arm's length institutional relationship with the EU. However, the agreements still require Switzerland to accept most of EU law, without participating in creating it, and to contribute to the EU's social and economic cohesion funds. Bilateralism does not bypass all the obligations that come with access to the EU's internal market.

More fundamentally, in December 2012 the European Council decided that the approach of Switzerland in seeking to negotiate sectoral agreements in more and more areas but without any institutional framework "has reached its limits and needs to be reconsidered". In short, the EU would not enter into any further free market agreements with Switzerland until a legally binding system was put in place in order to ensure consistency in the application of the internal market rules – i.e. a surveillance and court system like that under the EEA Agreement. The European Council added that by seeking to participate in the single market, Switzerland was "not only engaging in a bilateral arrangement but becomes a participant in a multilateral project", a view the Council repeated in December 2014. Bilateralism is by its nature limited in scope.

In 2012, the European Council was also critical of Switzerland's introduction of quota limits for certain categories of residence permits for citizens of eight EU member states, which the Council considered to be "discriminatory and in clear breach" of the bilateral agreements between the EU and Switzerland. In February 2014, a Swiss referendum voted "Against Mass Immigration", requiring within three years annual quotas on overall immigration into Switzerland. In December 2014, the Council confirmed the EU's refusal to amend the bilateral agreement with Switzerland covering the free movement of persons to allow for this referendum result. The Council said that it "considers that the free movement of persons is a fundamental pillar of EU policy and that the internal market and its four freedoms are indivisible." As far as the EU is concerned, Switzerland cannot have free movement of goods, services and capital with the EU without free movement of people.

The bilateral approach may not be any more politically acceptable in the UK than joining the EEA since it too requires acceptance of a raft of EU legislation and a contribution to the EU's economic and social cohesion funds in return for access to the EU internal market. But even if the UK were keen to adopt a bilateral approach, the EU might refuse unless an institutional structure, like that of the EEA, were put in place. There is a risk that a third parallel structure (a fourth if the Swiss fall into line), after the European Commission/CJEU and the EFTA Surveillance Authority/EFTA Court, might seem like undue proliferation, creating its own risk of inconsistency.

**Customs union**

If the UK entered into a customs union with the EU, the UK would have to follow the EU's overall trade policy. The EU would retain the ability to conclude trade agreements with third countries or groups of third countries without input from the UK. That would give those countries access to the UK market, on the terms negotiated by the EU. This could have an adverse impact on the UK given that, in the case of bilateral FTAs, the EU's negotiating strategy is generally to offer access to its market for goods in return for the third country offering access to its market for services. The UK would then have to negotiate separate FTAs with the same third countries to gain reciprocal access for UK goods and, more importantly, services.

As an example, a customs union between the EU and Turkey came into force on 1 January 1996. It covers most industrial goods, and requires Turkey to adopt the EU's common external tariffs, while removing tariffs and other restrictions on trade between the EU and Turkey. The customs union does not address agriculture (except processed agricultural products), public procurement or services. The absence of any provision for services (including financial services) would be of particular concern to the UK, since services represent over three-quarters of the UK's GDP.

A customs union would allow continued tariff-free access to the EU for UK manufactured goods, but the UK would lose the right to participate in standards setting in relation to the regulation of that trade. The UK would have to comply with EU state aid and competition rules. The UK would also need to abide by the EU's common commercial policy and common external tariff regime. For example, the customs union requires Turkey to apply the common customs tariff, common EU rules for imports, the EU procedure for administering quantitative quotas, EU protective measures against dumped and subsidised imports, common rules for exports, common rules for export credits, and common rules on textile imports and exports.

A recent World Bank evaluation of the EU's customs union with Turkey concluded that it is "increasingly becoming less well equipped to handle the changing dynamics of global trade integration". In particular, the slow pace of multilateral trade negotiations through the World Trade Organisation has led the EU to enter into numerous free trade agreements with third countries. Turkey has no role in the negotiation of these agreements. Unless Turkey enters into comparable trade agreements with the EU's counterparties, which some have been reluctant to do, goods from these countries can be routed through the EU into Turkey, but Turkish firms do not benefit from reciprocal access to the third countries' markets.

The limitations of the customs union are doubtless why the EU and Turkey announced in 2015 that they would be commencing negotiations to "modernise" the deal, which, if concluded, is likely to result in the customs union becoming a free trade agreement. Even in the unlikely event of the UK being prepared to enter into a customs union with the EU that omitted services, the narrow scope of the deal with Turkey and the EU's general policy in the area makes it improbable that the EU would do so.

As a member of the customs union, the UK would rely on its rights under the WTO General Agreement on Trade in Services (GATS.) The UK would be able to seek to negotiate agreements with non-EU third countries regarding trade in services.

**Free trade agreement**

In 2006, the European Commission published its "Global Strategy", which set out the objective of negotiating "deep and comprehensive" free trade agreements with strategic partners. Examples include the recently concluded FTAs with Canada and South Korea. The EU is in negotiations with the USA, India and others along the same lines. These are complicated and, at times, controversial agreements that, on top of removing tariffs, aim to open up markets in services, investment, public procurement and include regulatory issues. They take a long time to negotiate. The EU/South Korea FTA, for example, took four years, and the EU/Canada FTA took over five years and is still not in force despite negotiations having finished in 2014.

The content of any particular FTA is a matter for negotiation. An agreement between the EU and the UK would in all probability offer some access to the EU's internal market, but less than if the UK remained a member of the EU itself or of the EEA. The greater the access to its internal market granted by the EU, the more likely the EU is to insist on compliance with its rules.

Services are of fundamental importance to the UK given that over three-quarters of the UK's economy is made up of service industries. However, trade treaties do not generally go a great deal further in terms of access for services, and financial services in particular, than under the WTO GATS.

**World Trade Organisation**

The WTO model represents the UK's default option. It will apply if no other continuing arrangements are put in place between the UK and the EU.

Currently, the UK is a member of the WTO in its own right. However, as a member of the EU, which has also been in the WTO in its own right since 1995, the UK is part of the EU's common commercial policy, which, as a customs union, sets a common external tariff with WTO members outside the EU. As such, the EU's member states take part in the WTO almost exclusively through EU.

As a result, on leaving the EU, the UK would have to negotiate and agree through the WTO its own schedules of concessions in relation to goods, services and other issues with the EU's counterparties. In some cases, the counterparties might be content for the UK simply to continue on the same terms as the EU; in other cases, there might be a reluctance to do this or, at best, a delay in reaching agreement.

Exports to the EU from the UK, and vice versa, would be subject to tariffs. For example, UK car manufacturers would face a 10% tariff when exporting to the EU, and the 40% of components that they purchase from the EU would presumably be subject to the same tariff, pushing up the price of UK-built cars.

As a member of the WTO, the UK would rely on its rights under the WTO GATS. The UK would be able to seek to negotiate agreements with non-EU third countries regarding trade in services.

## Financial services

Free movement of capital would not, technically, be affected by UK departure from the EU. The TFEU removed (with limited exceptions) all restrictions on capital movements between EU members and also between the EU and third countries.

*EEA model*: Financial services are covered by the EEA Agreement. So, for example, the financial services "single passport" mechanism, which allows institutions established in one member state to provide their services in all member states, either through a branch or on a cross-border basis, in principle applies equally to members of the EEA. However, developments since the global economic crisis of 2008 have resulted in developments which in turn have led to the fracturing of the internal market for financial services between the EU and the EEA. This is mainly due to the advent of the European Supervisory Authorities (ESAs). The ESAs were created in 2010 to help oversee the financial services market and set universal standards on supervision. However, the ESAs also play a supervisory role in relation to financial services. The EEA Agreement does not cater for this and, as a result, measures taken in the field of financial services since 2010 which provide for a role to be played by the ESAs (which nearly all of them do) have not been applied to EEA states, despite recent attempts to find a solution.

Accordingly, if the UK were to remain a member of the EEA, there would be a risk that it might, over a period of time, lose access to the EU's internal market in financial services as EU legislation gives an increasing role to ESAs. In the insurance sector, by way of example, the EEA has not yet fully implemented the Solvency II Regulations or the Insurance Distribution Directive. Full implementation of these measures is likely to be challenging given the role of the insurance sector ESA, the European Insurance and Occupational Pension Authority (EIOPA), as regulator. Similarly, the revision of MiFID – which acts as the backbone for much of the internal market in financial services – will entail a role for the European Securities and Markets Authority (ESMA).

Further divergence may occur if the EEA does not follow guidance issued by the ESAs, with which EU members are complying. EIOPA, for example, provides specific guidance on the Solvency II Regulation to the EEA on a "comply or explain" basis, but compliance with EIOPA guidance may become increasingly difficult if EEA legislation starts to diverge from the EU legislation to which the guidance relates.

*Bilateral agreement model*: Under the bilateral agreement model, the UK's direct access to the EU financial services market would probably be heavily constrained. The current set of bilateral agreements between the EU and Switzerland does not provide for Swiss access to the EU internal market in financial services (other than some access for branches and agencies of non-life insurance business under a 1989 agreement of limited scope). In particular, Swiss firms face in many member states licensing and other barriers not faced by EU-passported firms if they wish to conduct

"Access to the EU's internal market in financial services will be key for the UK but is likely to be constrained whether by the absence of a role for the European Supervisory Authorities in relation to the EEA or the terms of any agreement between the EU and UK."

**Chris Bates**, Partner

cross-border business from Switzerland with clients or counterparties situated in those member states. A number of Swiss banks operate their EMEA investment banking business, and Swiss insurers and reinsurers operate some or all of their EMEA and global insurance business, through subsidiaries set up in the UK, thereby taking advantage of the EU passport rights currently available to UK incorporated and authorised firms.

There are recent EU initiatives to provide some access to the EU market for firms from non-EU jurisdictions which have equivalent legal regimes and which provide reciprocal access to EU firms, but these depend on the ability of the non-EU regime to pass an equivalence assessment by the European Commission (which may require the non-EU jurisdiction to conform all or part of its legislation to EU standards). They are in any event limited in scope. For example, in the insurance sector, Solvency II equivalence is available only in the areas of reinsurance, solvency and group supervision. The granting of equivalence has been a slow process, with only Switzerland and Bermuda having so far been granted full equivalence. Although it is likely the UK would be found equivalent for the purposes of Solvency II, this would likely require the UK not to make major amendments to its Solvency II implementation and to adopt any further EU insurance legislation without being able to influence its content.

*Customs union/FTA/WTO*: The UK's position would depend upon the deal it could negotiate with the EU. The WTO's General Agreement on Trade in Services (GATS) provides some basic provisions covering financial services, and FTAs are often successful at securing enhanced market access in terms of commercial presence (Mode 3 of GATS) and rights of establishment. They are less effective at allowing the provision of cross-border services (Modes 1 and 2 of GATS), covering only a relatively limited number of areas, such as advisory and other auxiliary services, financial data processing and insurance of risks relating to shipping and commercial aviation.

The GATS and trade agreements generally contain a provision known as a "prudential carve-out", under which parties to GATS or the treaty are permitted to retain restrictions on access to their financial markets for prudential reasons. Article 7.38 of the EU-Korea FTA, for example, provides that each party "may adopt or maintain measures for prudential reasons, including the protection of investors, depositors, policy-holders or persons to whom a fiduciary duty is owed by a financial service supplier; and ensuring the integrity and stability of the Party's financial system."

This means, in effect, that if the UK were to rely only on GATS or trade agreements in its relations with the EU and other third countries, trade in and cross border provision of financial services would be constrained.

More importantly for the financial services industry, the WTO regime, and GATS in particular, does not deal with non-tariff barriers in any great detail. Instead, the focus on non-tariff barriers tends to be concerned with whether they are discriminatory in nature and whether they can be objectively justified. The existence of non-tariff, behind-the-border barriers is perhaps the most significant

"In the insurance sector, full implementation by the EEA of the Solvency II Regulations and the Insurance Distribution Directive is likely to be challenging given the role of EIOPA. This will affect the ability of EEA insurers to use the single passport."

**Katherine Coates**, Partner

obstacle to market access and national treatment faced by the financial services industry globally.

## Migration

There are currently large numbers of EU nationals working in the UK, and vice versa, in a range of sectors, including financial services. A priority of any withdrawal agreement between the UK and the EU would be to address the right (or otherwise) of these workers to continue in their present jobs (a "grandfathering" system for current workers seems the most likely solution, whether from the date of the UK referendum or Brexit itself), but new arrangements would be required for migration once Brexit occured.

*EEA model*: The EEA Agreement provides for the free movement of persons. The position would therefore continue as it is now.

*Bilateral agreements model*: As indicated above as regards Switzerland, the EU has shown strong resistance to separating the free movement of persons from the other three internal market freedoms (goods, services and capital). Any bilateral agreement that allowed substantial access to the EU's internal market would most likely also require the free movement of persons.

*Customs union/FTA/WTO*: None of these models generally make provision for the free movement of persons. The UK would be free to impose whatever limits on entry to the UK it wished. So, for example, the UK could bar lower skilled workers from EU countries but encourage the migration of more highly skilled workers from outside the EU. Similarly, EU member states could place restrictions on UK citizens' right of entry into EU member states or their right to work.

## Employment law

A significant portion of UK employment law is derived from EU law, including the legislation that governs maternity and paternity leave, agency workers' rights, paid holiday and the protection of employment upon the transfer of a business. However, that law does not in the main depend upon the UK's continuing membership of the EU. It could continue in place until the UK chose to change it, to the extent that the UK's continuing relationship with the EU allowed the UK to depart from EU employment requirements.

> A priority of any withdrawal agreement would be to address the right of EU nationals to work in the UK and vice versa."
>
> **Alistair Woodland**, Partner

Indeed, the immediate repeal of all EU-derived legislation may be unattractive, potentially giving rise to inconsistency, confusion and uncertainty in the business community. Commercial agreements have been drafted to take into account the existing legislative regime (for example, long term outsourcing agreements where pricing will have been dictated by the commercial risks under the prevailing employment law regime). Many rights derived from EU law are now included in contracts, either between counterparties or with employees, so it will not be easy to disentangle them even if Parliament were to repeal EU-derived laws.

*EEA model*: EEA member states are obliged to accept the majority of EU employment legislation. The EEA Agreement incorporates, for example, a

> Much of the EU's employment law is derived from EU law but does not in the main depend on the UK's continuing membership of the EU. Immediate repeal of all EU-derived legislation is highly unlikely"
>
> **Alistair Woodland**, Partner

number of employment law directives including the Equal Treatment Directive, the Collective Redundancies Directive, the Part-Time Workers Directive, the Fixed Term Workers Directive, the Parental Leave Directive, the European Works Council Directive, the Acquired Rights Directive (from which the Transfer of Undertakings (Protection of Employment) Regulations 2006 (TUPE) are derived), the Working Time Directive and the Agency Workers Directive.

*Bilateral agreements model*: In order to gain significant access to the EU's internal market, the UK would probably be required to maintain certain employment standards. For these purposes, it would probably be necessary for the UK to accept a significant proportion of EU employment law.

*Customs union/FTA/WTO*: Under any of these models, the UK would have greater freedom to change its employment law. An agreement between the UK and the EU might conceivably contain a requirement that the UK observe certain minimum standards, but these would likely be less prescriptive than under either the EEA or bilateral agreements model.

## Tax

The power to levy direct taxes is generally a matter for the EU's member states, with only limited EU competence in the area. However, the right to tax must be exercised in a manner that is consistent with the EU's treaties. So, for example, VAT must meet the principles of fiscal neutrality, equivalence and non-discrimination, and tax treatments must not fall foul of the rules on state aid. The UK also has a number of double tax treaties with EU member states, which would continue in place even if the UK left the EU.

*EEA model*: Under the EEA agreement it is not permitted to use tax policy as a means to discriminate, directly or indirectly, against products from other members.

*Bilateral agreements model*: The UK's position would depend upon negotiation. The Swiss are not bound by similar anti-discrimination provisions to those found in the EEA treaty. Switzerland and the EU have agreed measures to share financial account information as part of the effort to reduce tax fraud.

*Customs union/FTA/WTO*: Depending on the terms of any agreement with the EU, the UK would have significantly more ability to shape its own tax laws, but would lose the tax coordination elements of EU membership. For example, preferential EU rules applicable to certain cross-border transactions would not apply, e.g. VAT may need to be charged on transactions where it is currently not charged and UK businesses may need to register for VAT in EU countries where they are currently not required to do so.

Although the UK government would be free to implement tax legislation which discriminates against entities in other member states, subject to the limited WTO restrictions, EU member states would also be free to exercise their taxing powers in a manner which, by accident or design, discriminates between local entities on one hand and UK entities (or local branches of UK entities) on the other hand. This could manifest itself in a number of ways. For example, a future EU Financial Transactions Tax could be implemented in a manner that taxes transactions relating to, or with persons in, the UK; or a UK bank which has

"After Brexit, the UK could introduce taxes discriminating against EU people and businesses, and EU countries could introduce taxes discriminating against the British. That could be one of the most significant medium term impacts of Brexit."

**Dan Neidle**, Partner

advanced a loan to an Italian or Spanish borrower could, upon Brexit, find that interest payments under the loan become subject to withholding tax (though this might be covered in the withdrawal agreement, perhaps exempting transactions entered into before Brexit or the referendum).

## Competition law

EU competition law prohibits anti-competitive agreements and concerted practices (article 101 of the TFEU), abuse of a dominant position (article 102), governs mergers in the EU that meet clear thresholds and conditions (through the EU Merger Regulation), prohibits certain state aid subsidies and regulates procurement activities of public bodies and undertakings. The UK's domestic legislation, principally the Competition Act 1998 and Enterprise Act 2002, largely mirrors EU legislation for competition issues within the UK, and is likely to remain in force even if the UK leaves the EU.

*EEA model*: The EEA Agreement replicates EU competition law. If the UK were to re-join the EEA under the same terms as Norway, its position would therefore broadly remain the same, subject to the following differences.

Enforcement of the competition prohibitions on anticompetitive agreements and abuse of dominance would be complicated by the addition of the EFTA Surveillance Authority to the list of authorities with enforcement powers in respect of the UK (currently, the European Commission, the Competition and Markets Authority (CMA) and numerous UK sector-specific regulators). That authority would also acquire the power to take over investigations initiated by a UK competition authority.

In place of the European Commission, the EFTA Surveillance Authority would become the sole authority with jurisdiction to monitor the UK's compliance with State aid laws and to grant State aid clearances to the UK government, and would also have jurisdiction to investigate complaints regarding infringements of the public procurement rules.

The European Commission would continue to have "one stop shop" jurisdiction to review mergers between parties exceeding certain turnover thresholds, including the effects of those mergers on competition in the UK. It is possible that some mergers – such as those between parties with significant operations in both the UK and Norway – would instead become notifiable to the EFTA Surveillance Authority for merger control clearance, which has no practical experience of reviewing mergers, to date. However, this is likely to be rare, if it happens at all.

Decisions of the EFTA Surveillance Authority can be appealed to the EFTA Court, which in practice has regard to the case law of the EU Courts, even if it is not always under a legal obligation to follow it. However, rulings of the EFTA Court are not binding on national courts of EEA/EFTA members to the same extent that those of the Court of Justice of the EU are on national courts of EU members. Moreover, while they have a discretion to do so, EEA/EFTA national courts are not required to refer questions regarding interpretation of the EEA Agreement to the EFTA Court. Consequently, there would be some scope for divergence between the interpretation of competition law by UK courts and those of EU member states and other EEA/EFTA member states.

"There is a possibility of divergence between EU and UK competition law, over time. This would create a potential disadvantage for large mergers involving UK businesses that raise competition concerns, as they would face having two, parallel reviews by each of the EU and UK authorities, instead of a "one-stop-shop" review by the European Commission as at present."

**Alex Nourry**, Partner

*Bilateral agreements model and customs union/FTA/WTO models*: The UK's position would depend upon negotiation. If the UK were to negotiate bilateral arrangements similar to those of Switzerland, Turkey or Canada, EU competition law would not apply in the UK, and UK courts and competition authorities would cease to be bound by case law of the EU Courts, creating the possibility of divergence between EU and UK competition law, over time. That said, divergence between Swiss and EU competition law is relatively limited and in any event the enforcement regime for EU competition law has not entirely succeeded in preventing divergences in the way that law is applied by different EU competition authorities.

UK businesses would remain subject to EU competition law to the extent that their conduct has effects in the EU. At present anticompetitive conduct that has effects in the EU as well as the UK is normally investigated either by the UK competition authorities (and possibly those of other EU member states) or the Commission, but not both. In contrast, under a bilateral agreements model, parallel investigations would be possible.

The UK would cease to fall within the jurisdiction of the EU merger control regime. This would create a potential disadvantage for large mergers involving UK businesses that raise competition concerns, as they would face having two, parallel reviews by each of the EU and UK authorities, instead of a "one-stop-shop" review by the European Commission as at present. For mergers that do not raise potential concerns the impact would vary, due to the voluntary nature of the UK merger control regime. Many mergers that currently meet the thresholds for a mandatory EU filing would continue to do so, in which case the impact would be neutral. Some mergers involving parties with activities focused in the UK would no longer meet the thresholds for an EU filing, in which case the impact could be either positive, because they would no longer need to make any filings, or negative, because they would need to make multiple filings under the national merger control regimes of EU member states.

*State aid and public procurement*: As noted, the EEA agreement prohibits state aid in the same way as the EU. Even under the "default" WTO option the UK would be restricted in its ability to grant competition-distorting subsidies and to discriminate against foreign bidders in public procurement procedures. However, these restrictions would be considerably less stringent than those which apply under EU law, so affording the UK government greater freedom in terms of assistance to UK industry or incentives to attract greater foreign investment into the UK. If a bilateral agreement, customs union or free trade agreement were to be negotiated, some of these restrictions may be strengthened or expanded in scope beyond the minimum WTO requirements, as is the case for Switzerland and Turkey, for example.

## Data protection

The UK data protection regime is based on EU Directives. By 2018 it is expected to be replaced by a new, directly effective EU regime, created by the EU General Data Protection Regulation. The Regulation will set higher standards of data protection, which – if the Regulation ever took effect in the UK – would need to be replaced by local laws if the UK left the EEA.

*EEA model*: The EU data protection regime would continue to apply if the UK stayed within the EEA.

*Bilateral agreements/customs union/FTA/WTO*: The UK's position would depend on the outcome of negotiations with the EU, but the UK could, if so minded, change its law to create a relatively

"The UK could, if so minded, change its law to create a relatively light-touch regime."

**Richard Jones**, Director of Data Privacy light-touch regime. In principle, this would reduce the regulatory burden for UK businesses and may create competitive advantages. However, the EU regime would restrict transfers of personal data to the UK if the European Commission and EU Court of Justice did not regard the UK regime as "adequate". The Court has recently interpreted "adequate" to mean "broadly equivalent", so in practice the UK may need essentially to implement the EU regime to avoid disruption to flows of data between the UK and the EU and EEA member states. The mechanisms available to overcome the transfer restrictions, which are used now to allow transfers to other jurisdictions without equivalent regimes, such as India and the US, are relatively straightforward but may be difficult to apply in practice given the very wide range of data flows between the UK and Continental Europe.

Switzerland and some other countries have, in effect, bilateral arrangements with the EU, through which the European Commission recognises their data protection regimes as adequate, on the basis that they are similar to the current EU regime. It remains to be seen whether a UK regime which continues (or resurrects) the current law, rather than reflecting the requirements of the new Regulation, would be accepted as adequate in the new environment. A standard lower than that of the current EU regime would almost certainly *not* be regarded as adequate.

A theoretical possibility might be to implement a basic, less burdensome regime, but with enhanced standards for data coming from the EU/EEA. This might allow, for example, relatively free flows of "UK-only" data to countries without strict data protection regimes, while protecting data originating in the EEA. The proposed US "privacy shield" is a similar concept.

UK businesses would also lose the advantage of the limited "one-stop shop" concept in the current EU regime, which will be somewhat enhanced by the Regulation. Some processing will inevitably be regulated by both UK and EU data protection law and subject to enforcement by both UK and EU data protection authorities, for example where a UK business outsources processing to a service provider in the EU or operates through a branch in an EU member state. Conceivably, a new agreement with the EU could address this issue.

## Intellectual property

Various intellectual property rights cover the whole EU through a single unitary right, for example European Union trade marks (EUTM) and EU designs. These rights co-exist with nationally granted rights in individual Member States. When new member states have joined the EU, existing EU unitary rights have been automatically extended to the accession countries, subject to provisions for conflicts with pre-existing national rights in the new member state. There is no precedent for what happens when a member state leaves.

The UK would in all likelihood be removed from the protection given by the EUTM and other unitary rights. The thousands of brandowners and other rightholders around the world who protect their rights in Europe via the EUTM and other unitary systems will then be at risk of being deprived of protection in the UK if they do not have equivalent national rights in the UK. Potentially, the UK could allow for some form of automatic or optional national right reflecting the previous EUTM protection.

"Brexit will impact IP owners both inside and outside the UK, most obviously as regards unitary IP rights including Community trademarks and designs, and the proposed unitary European patent."

**Vanessa Marsland**, Partner

A unitary European patent is also imminent (applicable to all EU member states except Spain). Brexit might significantly delay, even derail, this patent initiative; currently UK ratification is one of the preconditions for it to go live. A particular issue which will arise is the impact on planned changes to patent litigation in Europe – one of the three Central Divisions of the new Unified Patent Court is currently under construction at the Aldgate Tower in London.

*EEA model*: EU Directives have harmonised the law relating to national trade marks and designs, and soon trade secrets, as well as harmonising many aspects of copyright and other more specific and specialised areas. The signatories of the EEA Agreement are bound to adjust their legislation to achieve "at least the level of protection of intellectual property prevailing in the Community" and in practice tend to have similar laws, in order to reach this standard. However, EUTM and other unitary rights do not extend to EEA countries.

*Bilateral agreements model*: Most IP agreements are multilateral rather than bilateral, and the UK would remain party to international treaties such as the Berne Convention for the Protection of Literary and Artistic Works, the Paris Convention for the Protection of Industrial Property, and the WTO's Agreement on Trade-Related Aspects of Intellectual Property Rights, "TRIPS". In practical terms, any agreement that might be reached between the EU and the UK would likely follow the EU's current model.

*Customs union/FTA/WTO*: As discussed above, there are numerous international IP treaties to which the UK is a party in its own right and which would continue to apply. These set various minimum standards for IP protection which the UK would have to continue to meet. Following Brexit on this model, the UK would no longer be bound to implement EU legislation, potentially allowing UK law to diverge within the framework of the international treaties. This would not apply to most of the UK's substantive patent law, as this follows the European Patent Convention, which is not a Community instrument.

Some rightholders may also be affected if their rights require an EU nexus for the existence of the right. These rights tend to be of application to specific sectors. For example, the EU database right requires the "maker" of the database to be EU-based. Post Brexit, UK rightholders might lose these rights (at least outside the UK) and rightsholders in member states might lose rights in the UK.

## Commercial contracts and related issues

Brexit may have practical implications for relations under commercial contracts, though it is likely to be at least two years after the referendum before Brexit occurs, which will give the parties some time to reach a consensus as to the position after Brexit.

"While most potential implications under commercial contracts are likely to turn heavily on the specific drafting of the contracts in question, there are certain standard terms such as illegality, market disruption and material adverse change clauses which could be triggered for certain classes of contractual parties in the event of Brexit. In addition, clauses dealing with choice of law and jurisdiction assume a common EU law-based regime which would cease to apply to English courts after Brexit and the effects of such clauses could therefore become less certain."

**James Butters**, Partner

An example of the impact of Brexit on contracts could be the proper meaning of a reference to EU member states in a contract. It will be a matter of the interpretation of the agreement as to whether this means the member states at the time the contract was entered into or the member states for the time being. At the extreme (albeit very unlikely), if the conduct of the business in question requires an EU passport or other EU authorisation, and is unlawful without it, it may be that the contract will be frustrated. Even if such an extreme consequence is avoided, it is possible that contractual illegality clauses (e.g. in loan agreements) could be triggered where a party's performance of its obligations would become unlawful due to the loss of an EU-based status or authorisation. The withdrawal agreement between the EU and the UK might be expected to cover the position of existing contracts.

The fact of the referendum vote itself, or the fall-out from the subsequent Brexit, could cause market or other turbulence that might trigger a market disruption clause in a contract (e.g. because payment or communications systems are unavailable) or a material adverse change clause if a party's ability to perform its obligations was severely affected. Any contractual implications of this sort will depend heavily on the drafting of the relevant clause and the facts.

Parties' choice of governing law is unlikely to be affected by Brexit. Courts in the EU will continue to apply the Rome I Regulation on the law applicable to contractual obligations, which generally gives effect to the parties' choice of law whether than choice is the law of an EU member state or of a non-member. Whether or not the UK adopts Rome I as its national law, the English courts will similarly continue to give effect to the parties' choice.

The jurisdiction of the courts and the mutual enforcement of judgments between the UK and the EU could be directly affected by Brexit because this depends in large part on the Brussels I Regulation on jurisdiction and the enforcement of judgments in civil and commercial matters. The Brussels I Regulation would cease to apply to the UK on Brexit. However, in practice the position may not change substantively.

The Lugano Convention applies as between EU and EFTA members, and is substantially the same as the Brussels I Regulation (it mirrors Brussels I in the form Brussels I was in before its "recast" with effect from January 2015). The Lugano Convention is open for signature by EFTA members. If the UK (re-)joined EFTA, the UK could sign up to the Lugano Convention. However, even if the UK did not join EFTA, the UK could still apply to accede to the Lugano Convention, though this would require the unanimous consent of all other parties.
This might be one of the easier aspects of the withdrawal agreement.

The UK could also accede to the Hague Convention on exclusive choice of court agreements, which provides for the recognition of exclusive choice of court agreements and the enforcement of judgments given by a court on which exclusive jurisdiction is conferred. The EU has already brought this Convention into force. The Hague Convention is, however, limited in its scope because it only applies to exclusive jurisdiction agreements, and many jurisdiction agreements in, for example, financial agreements are non-exclusive.

If the UK did not or could not sign up to an agreement on jurisdiction and the enforcement of judgments, these matters would depend upon the domestic law in each country, at least until a new treaty was signed. So, for example, the UK courts would be freed from the prohibition on granting anti-suit injunctions to restrain a party from pursuing proceedings in an EU or EFTA member state in breach of its agreement as to jurisdiction.

The recognition of arbitration agreements and the enforcement of arbitral awards would be unaffected by Brexit. Both these matters depend upon the New York Convention, which is not an EU treaty.

As a member of the EU, the UK is subject to the EU Insolvency Regulation. This provides for cross-border recognition of an EU member court's decisions in respect of insolvency proceedings (with the exception of Denmark, which has opted out.) This mechanism smoothes the progress of restructuring across EU members' borders. It would continue to apply if the UK remained in the EEA, but not otherwise.

Similarity, the EU's Bank Recovery and Resolution Directive (BRRD) requires EU member states to legislate so that courts and authorities in one EU member state to recognise resolution actions taken by the resolution authority in another member state. Currently banks in the EU are required to include clauses in their non-EU law governed contracts recognising the applicability of the BRRD resolution regime. On Brexit, EU banks would need to include these clauses in their English law governed contracts as well.

## Trade relationships with non-EU members

Fifty-three trade agreements have been concluded between the EU, with the UK as a member, and third countries, with negotiations in progress with the USA, Japan, India and a number of ASEAN countries, among others.

In the case of existing trade agreements, there will be uncertainty whether these agreements would continue between the UK and the other (non-EU) contracting parties. The UK and the counterparty could agree that the agreements should continue on the same terms or subject to certain modifications. Failing this, the UK would either have to negotiate fresh bilateral FTAs with each of those countries or fall back on its more limited WTO rights, which would also have to be re-established for the UK as a non-EU member. Institutionally, the UK would have to rebuild its expertise in this area as well as its capacity to carry on a large number of simultaneous negotiations with partners who might feel less inclined to give the UK as generous market access and national treatment as they did to the EU, given the UK's much smaller relative bargaining power. The process could also be a lengthy one. For example, the EU began free trade negotiations with India in 2007, and negotiations have yet to be concluded. Even simple agreements have taken two to three years to negotiate.

Much would also depend on the type of relationship that the UK would have with the EU after any exit. Generally speaking, the UK would trade with non-EU countries either on a WTO "most favoured nation" basis in goods, or under the relatively limited provisions of the WTO GATS for services.

"In relation to trade agreements, the UK would have to rebuild the capacity to carry on a large number of simultaneous negotiations with partners. The process could also be a lengthy one."

**Jessica Gladstone**, Partner

## Environmental and climate change law

Although the UK has a long history of environmental legislation, a great deal of current UK environmental law derives from EU legislation covering areas such as water and air quality, industrial emissions control, waste policy, chemicals and hazardous substances regulation, environmental impact assessment, climate change and emissions trading. In particular the EU has been instrumental in establishing common environmental quality standards. The UK could decide to keep all of this legislation in place following Brexit but compliance with at least some EU legislation would be required to maintain the UK's trading relationship with the EU.

If the UK decides to weaken any particular environmental standards or regulatory frameworks, it seems likely that any change would be done through a process of gradual reform rather than an overnight cull of environmental laws.

*EEA model*: The UK would have to retain or re-enact most EU environmental legislation to ensure full access to the EU market. This would include areas such as integrated environmental permitting, water and air quality, waste management and chemicals legislation. The UK would be subject to certain climate change legislation and, like Norway, would be able to take part in the EU Emissions Trading System. The UK would not have to comply with the Habitats and Birds Directives which provide protection at European level for designated species and habitats. While these Directives have proved politically controversial, particularly in relation to the costs of compliance, it seems unlikely that the UK government would seek to significantly reduce protection of existing designated sites given its continuing commitments under various international agreements.

*Bilateral Agreements model*: In general, the UK would still have to comply with all rules relating to standards of safety and environmental sustainability of products being put on the EU market. However, the UK might be able to relax some laws relating to operational environmental protection controls within UK borders. These include areas where the UK has found it difficult to comply with EU environmental standards (e.g. in relation to air quality), or where the UK seeks additional flexibility in determining how to achieve its environmental goals (e.g. in relation to targets for renewable energy generation or energy efficiency). There are a number of reasons why environmental and safety standards might not be significantly lowered more generally:

- The presence of international agreements which the UK will still have to comply with (e.g. the Kyoto protocol on carbon emission reductions, OSPAR Convention on marine pollution, the Bern Convention).
- The UK has been a driver for stronger EU policy in some areas (e.g. integrated permitting, climate change policy and emissions reporting) where the EU has largely adopted UK practices; or the UK has pursued its own environmental framework, e.g. in relation to contaminated land remediation.
- While attempts to roll back environmental protections might find favour with some business sectors, these would be subject to close scrutiny by NGOs and be likely to be resisted by NGOS and the public alike.

"Any proposal to weaken environmental standards significantly following a Brexit is likely to be resisted by NGOs and the public alike."

**Nigel Howorth**, Partner

Irrespective of whether standards would be significantly lowered, it is possible that environmental policy driven purely by domestic politics would be more changeable than the longstanding and gradually evolving policy framework that currently applies across the EU.

### Other issues

There are any number of other issues that would arise from a UK departure from the EU. The following are some examples.

- The UK would no longer take part in the EU's Common Agricultural Policy (CAP) or Common Fisheries Policy (CFP).
- The UK would be able to pursue a justice and home affairs policy independent of the EU, which would mean no longer taking part in such initiatives as the European Arrest Warrant.
- The UK would no longer have automatic access to mechanisms which provide for pension schemes to operate across EU borders.
- Depending on the UK's post-Brexit arrangements, UK citizens may no longer enjoy reciprocal access to healthcare in EU member states.
- Mutual recognition of qualifications may also be affected.

### What should businesses be doing now?

Businesses are increasingly considering conducting scenario and contingency planning. It is especially relevant for financial institutions which currently take advantage of passporting from the UK to other EU member states. It is important to know, on a jurisdiction-by-jurisdiction basis, what licensing or other requirement would be required for business that is currently conducted under a passport that would no longer be possible post-Brexit. Whilst firms are likely to have two years' grace at least, it would be sensible to start considering contingency plans now, because implementing plans, such as cross border mergers, will take time and two years is a short period of time.

Brexit is likely to have implications for contracts, financial market accessibility, employee relations, data protection, IP, competition law, M&A, tax and other areas, as discussed in this paper.

It is important to note that any money or support that businesses give to either side of the campaign could be a political donation covered by the Companies Act 2006 and Political Parties, Elections and Referendums Act 2000. The 2000 Act also regulates activity carried out by companies that are not part of an official campaign but which is nevertheless intended to procure or promote a particular outcome. If companies wish to campaign for a particular outcome they may have to register with the Electoral Commission. If they do not wish to register with the Electoral Commission they need to be careful not to be seen as procuring or promoting a particular outcome or keep their spending below a certain threshold.

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