

**BRODIES**<sup>LLP</sup>

**Brexit Q&A**





## Brexit process

### Is the Brexit vote binding?

No, the referendum result has no binding legal effect, although politicians from the Remain campaign have pledged to respect the outcome.

### How will Britain withdraw from the EU?

**Article 50** of the Treaty on European Union provides that “any Member State may decide to withdraw from the Union in accordance with its own constitutional requirements”. To invoke Article 50, a Member State must formally notify the European Council of its intention to withdraw from the EU. There is no set deadline by which that must be done.

There is currently a debate over whether a separate vote in Parliament is required to authorise the giving of the Article 50 notice, or if the Government may do so unilaterally.

Once Article 50 is triggered, formal negotiations will begin on an agreement between the UK and the EU “setting out the arrangements for... withdrawal, taking account of the framework for its future relationship with the Union”. That agreement would include, among other things, the date on which the UK’s exit would take effect.

If no agreement can be reached, the UK would automatically withdraw from the EU two years after handing in its notice unless all the other Member States agreed to extend the deadline. [Read more](#)

### What are the alternatives to EU membership?

**A variety of different models have been proposed** for a future UK-EU relationship, based on the relationships that various countries around Europe have with the EU.

Any UK-EU arrangement is likely to be unique, but there are generally three alternative models for a future relationship: (1) the ‘Norway’ (EEA) model; (2) a negotiated bilateral agreement; and (3) World Trade Organization (WTO) membership only.

## The Norwegian model (EEA)

- Norway, like Iceland and Lichtenstein, is in the European Economic Area (EEA) but not in the EU. The Norway model is as close to being an EU Member State as a country can be without actually being in the EU, and thus would involve the least amount of change for the UK compared to the status quo.
- The EU’s free movement principles apply to EEA states, including the free movement of services and workers (though exceptions have been made on the latter for Lichtenstein).
- EEA countries are generally obliged to adopt the EU’s Single Market rules in their own domestic laws (not just when trading with the EU).
- They also have to adopt certain other aspects of EU law but have no formal vote or say on how those rules are made.
- They have to make contributions to the EU budget, albeit at a lower level than Member States.
- EEA countries are not covered by the EU’s Common Agricultural and Fisheries Policies.
- Although EEA countries are not subject to the jurisdiction of the Court of Justice of the European Union, a similar role is performed for EEA countries by the EFTA Court.

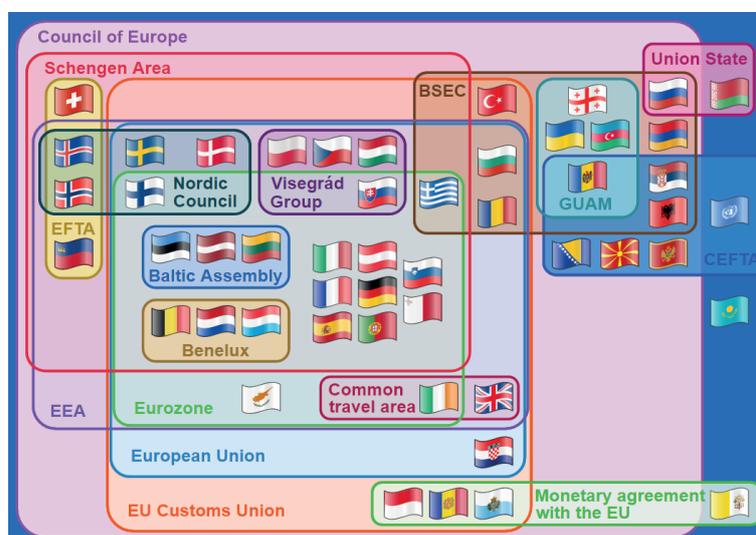


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## Negotiated bilateral agreement

The UK might also look to enter into bilateral trade agreements, allowing access to the single market on a negotiated basis. EU agreements with Switzerland, Turkey and Canada show different routes the relationship might take.

- **Switzerland** is a member of the European Free Trade Association (EFTA) but not the EEA. Its agreements with the EU nevertheless come close to replicating EU/EEA membership. It has access to the single market in some areas but not in others, including being excluded from the financial services 'passporting' rules. Like the EEA countries, however, Switzerland has had to accept certain trade-offs in return for market access, including applying the free movement of persons, making some contribution to the EU budget (though lower again than the EEA countries) and having to comply with the majority of the Single Market rules.
- **Turkey** has access to the EU customs union, which ensures that tariffs are not applied to Turkey-EU trade in goods. While the UK would not be bound by most EU law under this model, it would have to apply the same controls on imports that apply to goods entering the EU from non-EU countries, with limited ability to influence the formation of those rules. The customs union only covers goods rather than services. The free movement rules do not otherwise apply to Turkey.
- **Canada** has recently negotiated a Comprehensive Economic and Trade Agreement (CETA) with the EU allowing for tariff-free trade in industrial and fisheries products and some agricultural products. It will also remove some non-tariff barriers for other goods and services, including financial services, but not to the same extent as intra-EU passporting rights. Free movement of persons will not apply, though it will be easier to move key personnel between the EU and Canada. Canada will not have to make any contributions to the EU budget.

The suggestions from the UK Government are that they are likely to pursue something along the lines of the Canada CETA, though undoubtedly with modifications. The challenge with achieving any bilateral agreement with the EU is that those generally take years to negotiate (the EU-Canada agreement took seven years to finalise), although the EU and UK are of course starting from a very integrated position.

## WTO membership

The UK is a member of the WTO, as is the EU. If no specific agreement can be reached with the EU then the trade relationship will revert to using the same rules as those applying to other WTO members in their trade with the EU. Those do not prohibit tariffs but do place caps on them, and require 'most favoured nation' treatment to be given to other WTO members (i.e. the same tariffs must be applied to all members, unless a bilateral or multilateral trade agreement says otherwise). UK exports to the EU could therefore face tariffs. The UK would have discretion over placing tariffs on imports from the EU, as long as the same duties were also applied to other WTO members.

## What about trade with non-EU countries?

The UK would not benefit from the EU's 53 existing free trade agreements with other non-EU countries under any of the above models other than the Turkey option (membership of the EU customs union). However, this also means that under all the other options (including EEA membership) the UK would be free to enter into its own trade agreements with non-EU countries.

The UK Government has established a Department and Secretary of State for International Trade with a mandate to pursue trade deals with non-EU countries, including those that already have deals in place with the EU and are keen to preserve their ability to trade freely with the UK.

The UK is not able to conclude trade agreements with non-EU countries while a member of the EU (unless some special transitional allowance is made), but can start negotiating them with a view to concluding them immediately post-Brexit. The UK Government is therefore looking to 'staff up' on trade negotiation expertise very quickly, in order to negotiate these deals in parallel with its negotiations with the EU. The more non-EU trade deals the UK can agree, the more the potential impact of Brexit on UK trade can be mitigated.





## Will the UK be able to negotiate a trade agreement with the EU without accepting freedom of movement?

That will depend on the negotiating position taken by the EU and on the extent to which the UK seeks concessions, in particular in relation to access to the single market.

## What impact will Brexit have on UK and Scottish legislation?

The EU referendum result has no immediate impact on **UK or Scottish legislation**: the law remains as it was on 23 June 2016.

On withdrawal from the EU, under Article 50 the UK would no longer be formally required to comply with EU law and could repeal or amend domestic laws that give effect to EU law. As explained above, any new deal with the EU might involve agreeing to continue to respect EU laws.

## Will EU citizens be able to continue to live and work in the UK?

The EU referendum result has no immediate impact on employment law or the rights of EU nationals to live and work in the UK. The UK is still a full member of the EU and will be until the date of any exit.

After Brexit, EU nationals will no longer enjoy the automatic right to live and work in the UK (and vice versa).

The status of EU nationals in the UK will form a key part of negotiations to establish any new relationship between the UK and the EU. Different rules may apply to EU workers who are already in the UK and those who arrive after the referendum or after Brexit.

Depending on the shape of the UK's future relationship with the EU, it is very likely that the immigration rules will have to change: involving increased administration and costs for those

employing EU workers. The existing points-based system for non-EEA workers could be extended to EU workers and different rules might apply depending on whether workers are skilled or unskilled. We have produced a short guide to UK citizenship [here](#)

## What impact will Brexit have on employment law in the UK?

A lot of **employment law** that applies in the UK today has been generated by the UK Parliament rather than by the EU. Brexit would not, of itself, result in changes to the law on unfair dismissal or the national minimum wage.

Equally, where EU law does apply the UK has in many cases opted to provide increased worker benefits or protection – for example by providing for more paid holiday time than is required by EU law. Brexit would not of itself cause any change in these laws.

In the longer term, the UK would be free to change employment law in ways that are currently prohibited by the EU, for example in relation to discrimination law or TUPE.

## Will Brexit lead to tariffs on UK goods / services?

That will depend on the terms of any future relationship between the UK and the EU. An agreement that included membership of the EU Customs Union would protect the UK against tariffs being applied to trade with the rest of the EU, and give the UK the benefit of agreements reached between the EU and third countries.

### Did You Know?

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## What will the impact be on supply chains involving EU states?

Contractual pricing mechanisms may be affected by any tariffs that might be imposed on UK trade with the EU or with a third country (as a result of a trade agreement between the EU and that country ceasing to cover the UK), as well as possible changes in UK VAT and other tax structures.

There may also be an increased administrative burden (and associated cost) if import / export licensing and other controls were to be imposed. These impacts might be felt directly between the parties to the contract or be passed on from elsewhere in the supply chain. However, much of these impacts may be mitigated or removed if the UK can negotiate preferential trade agreements with the EU and other countries.

## How will Brexit affect commercial contracts?

Unless a contract expressly contains a termination right in the event of the UK leaving the EU (or voting to do so), it is doubtful that a party could terminate solely on that ground. However, this may vary in each case depending on the particular facts and contractual terms (including any material adverse change or force majeure clauses).

Contracts that refer explicitly to the EU in defining their territorial scope may no longer include a post-Brexit UK, unless the contract is structured to accommodate changes in EU membership. This issue may arise, for example, in agency agreements entitling the agent to represent the principal in the EU. If a contract is unclear on the position it can be amended, so long as the parties agree.

If there is a dispute over whether a contract should still cover the UK post-Brexit, there may be scope to argue over what the parties intended when the contract was agreed.

Any business that is concerned about the status of its existing contracts, or the terms to include in future contracts, should take advice now.

Brodies has developed a highly innovative contract management solution, BOrganised™, which can help organisations identify contracts that are likely to be impacted by Brexit. [See here](#) for more information on Brexit and commercial contracts at [BOrganised](#)

## What will happen to IP rights post-Brexit?

There will be no immediate change to the effectiveness, enforceability or validity of any registered or unregistered intellectual property rights (IPRs) in the UK or EU. Even post-Brexit some types of IPRs will be unaffected, including UK registered and unregistered IPRs and European Patents (including European (UK) patents). The latter are obtained from the European Patent Office and are not tied to membership of the EU.

EU trade marks and EU registered designs will remain valid in the UK at least until withdrawal, after which they will no longer cover the UK and separate registrations will be needed, unless the UK decided to treat EU Trade Marks (EUTMs)/EU Design Rights (EUDRs) as conferring a UK national right.

Businesses that are not yet using their EUTMs in the UK, but will want coverage here post-Brexit, should start using them here soon. They may also wish to consider registering separate UK IPRs now. In addition if EUTMS are only currently used in the UK, businesses should consider starting to use them in other member states. They may also wish to register separate UK IPRs now.

The new Unitary Patent (UP) and Unified Patent Court (UPC) system depends on membership of the EU. Unless agreement can be reached on extending the system to a post-Brexit UK, it will not be covered by any Unitary Patent.

As with other commercial contracts, licensing agreements that refer only to the EU should be reviewed to consider whether the UK might still be covered. [Read more](#)

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## What will Brexit mean for data protection?

The EU's new **General Data Protection Regulation** (GDPR) was finalised in May 2016, but the Brexit vote does not mean that preparations for its introduction should now be discontinued. The UK is unlikely to leave the EU before the GDPR comes into force on 25 May 2018, and so the GDPR will take effect in the UK unless both the UK and the rest of the EU agree otherwise.

In any event, the GDPR's terms will still be relevant to the UK. Firstly, the GDPR requires non-EU organisations to comply with the GDPR's terms when processing the personal data of EU citizens for the purposes of offering goods and services (or monitoring activities). So, for example, UK companies targeting online sales to EU citizens will be caught. Secondly, assuming the UK will want to make it easy for personal data to be transferred from the EU to the UK, we will need to adopt the GDPR or something very similar that the EU will recognise as giving adequate protection to personal data.

**See here** for more information on Brexit and data protection.

## What will Brexit mean for UK and Scottish tax?

VAT will likely continue to apply in the UK, although it may start to diverge from the current VAT regime. There are some areas where HMRC's approach already differs from EU law, and other areas where the UK Government will be free to make changes that are not currently permitted.

Most UK tax law is domestic, and so will not be affected by Brexit, but there are exceptions. Some EU directives allow dividends and interest to be paid between group companies in the EU without withholding tax. These would no longer apply, so companies would need to rely on double tax treaties.

Some UK tax reliefs are constrained by EU State aid rules, for example the Patent Box, the Enterprise Investment Scheme, Enterprise Management Incentives and the like, and Brexit might give greater freedom in these areas, though much, of course, depends on the UK's relationship with the EU post-Brexit. If the UK became a member of the EEA, it is likely that the State aid rules, in some shape or form would continue to apply.

## Will Brexit have an impact on procurement law?

Any future **procurement law regime** would depend to a great extent on the terms of the UK's future relationship with the EU. Membership of the EEA would require the UK to comply with EU procurement directives. By contrast, the Swiss model of bilateral agreements with the EU would allow greater flexibility.

The UK is also a party to the WTO treaty on Government Procurement (GPA) as are the other EU member states, together with Canada, China, Japan, Norway, Switzerland and the US (from a total of 46 countries). The founding principles of the GPA of non-discrimination, transparency and procedural fairness are very similar to those underpinning EU procurement law.

Unless the UK failed to reach any agreement with the EU and also pulled out of the GPA, it is very likely that we will continue to have national procurement legislation looking very similar to that which currently implements the EU Directives.





## What effect will Brexit have on State aid?

The law on State aid, governing when public funds and resources can be used to support commercial enterprises, is entirely EU-based. If the UK withdraws from the EU then it will no longer be bound by the EU State aid regime.

The UK may wish to create domestic rules on State aid and any new deal with the EU may involve agreement by the UK to respect the EU State aid regime.

## Will consumer protection legislation have to be rewritten?

Many of the UK's consumer protection rules come from the EU, including large parts of the Consumer Rights Act 2015. Subject to any future UK-EU trade deal (including EEA membership), a post-Brexit UK will have greater flexibility to modify or repeal national consumer protection legislation.

However, change in those areas is not inevitable. Indeed, there are several areas where the UK has gone further than the minimum requirements of EU law.

## Sector focus – the key issues

### What will be the impact of Brexit on the renewables sector?

EU law includes three Energy Directives and the Energy and Environmental State Aid Guidelines (EEAG) adopted in 2014. The EEAG (and their predecessor) are the foundation of the various support schemes in place for low carbon deployment – contracts for difference (CfD), the renewables obligation (RO), the feed in tariff (FIT), the renewable heat incentive (RHI) and, indeed, the capacity market, which is intended to ensure security of supply in the GB market.

If a UK-EU trade deal includes continued integration of energy markets, the UK would expect to continue to comply with the EU rules. Otherwise the UK would have full control over the regulatory regime and

support schemes for renewables. This could include redesigning them. Energy policy in a post-Brexit UK may therefore be less certain (at least in the short term) given the greater divergence of views on energy and environmental policy among the main UK political parties compared to views at EU level.

### What will be the impact of Brexit on the financial services sector?

UK firms that have 'passport' into other EU member states, and so are able to operate there on the basis of much lighter regulation (provided they comply with their UK regulatory requirements), may be faced with additional local regulation unless the UK and EU agree that the passporting rules will continue to apply. That will be the case if the UK takes EEA membership.

Otherwise, firms could potentially have to set up independently-regulated branches or subsidiaries in EU countries. The same considerations would apply to EU firms currently passporting into the UK.

A divergence of the rules applying to products such as consumer finance contracts and mortgages, which are heavily influenced by EU law, could affect both compliance costs and access to customers elsewhere in the EU. Financial services firms should be considering investment mandates and product terms in light of possible changes to the regulatory framework and the potential impact on their customer base.

While compensation schemes in respect of funds held on deposit operate on a national basis, they are subject to an EU framework and so could be subject to change post-Brexit.

The availability and cost of finance may be affected if the free movement of capital rules no longer apply to the UK. Asset values may be affected by the Leave vote, at least in the short-term, which may impact on the availability of new finance. Terms of funding packages should be reviewed for the potential impact of increased costs.



## What will be the impact of Brexit on the farming sector?

The EU Common Agricultural Policy will cease to apply, even if the UK becomes a member of the EEA. It remains unclear what approach UK and Scottish Governments will take to farming support following Brexit.

Existing contracts, not just for land, may refer to EU legislation, with agricultural leases and contract farming arrangements incorporating EU provisions.

We are advising clients to review those contracts and to consider negotiating changes where it may be prudent to do so.

## What will be the impact of Brexit for the fishing industry?

**The Common Fisheries Policy (CFP)** provides equal access to the territorial waters of EU Member States and a system of community management of fishery resources and conservation measures. The EU negotiates treaties with third countries for access to EU territorial waters and vice versa. Following negotiations over jointly managed stocks and consultation with industry, scientists and others, it establishes total annual allowable catches for the main stocks in EU waters and allocates quotas to each Member State.

The UK will, on leaving the EU, cease to be subject to the CFP and the EU quota system. EEA countries are not covered by the CFP. Fish stocks within the UK's territorial waters will, subject to any deal with the EU, be under UK control and the UK will determine conservation measures and catch limits.

However, Brexit is unlikely to mean a free-for-all for the UK industry in UK waters. Global marine regulation derives not only from the EU but also from international treaties and conventions to which the UK will remain a party.

## What will be the impact of Brexit on the charities sector?

Charities will continue to focus on delivering activities to further their purposes, but there are some Brexit points they will wish to consider.

Charities in receipt of direct European funding (such as ERDF) will wish to examine the impact on current contracts and future funding prospects from European, UK and Scottish sources, as part of any wider funding diversification strategies. Keeping to financial matters, donations made across European borders may no longer attract charitable tax reliefs, as that rule comes from EU law. Indeed, the definition of "charitable" for UK tax purposes is derived from the EU.

Charities with investments (including foreign currency) will wish to carefully monitor developments against their legal investment duties and standards, and work with their financial advisers accordingly.

As well as funding sourced from European bodies, charities will need to consider the longer term working arrangements with any European based partners and how these will be affected in terms of logistics, such as the free movement of labour.

# Brodies Brexit Advisory Group

Our Brexit Advisory Group is led by our constitutional law experts, supporting sector specialists who can provide pragmatic and informed advice on all of the issues raised by Brexit – helping you to plan for and implement any necessary changes to your business or organisation.



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