



The UK sets in motion its exit from the European Union

March 29, 2017

LATHAM & WATKINS^{LLP}

Following the British public referendum to leave the EU on June 23, 2016, the UK government served notice under Article 50 of the Treaty on the European Union (TEU) on March 29, 2017.

The period between the referendum and the notice has been one of uncertainty, both as to the timing and scope of Brexit. While the notice offered no concrete information to the many people and companies that reside in or trade with the UK, this much is certain: **the British exit from the EU has begun.**

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“...no deal for Britain is better than a bad deal...”,
Prime Minister Theresa May, January 2017

When will Brexit come into effect?

The UK now has a two-year period under Article 50 to agree to the terms for withdrawal and possibly the terms of its future relations with the remaining members of the EU. Any extension of the negotiating period for withdrawal will require the consent of *all* of the remaining 27 Member States.

The UK position, red lines and wish list

Our current understanding of the UK government’s Brexit strategy comes primarily from Prime Minister May’s January 2017 speech, in which she set out the government’s 12 priorities for Brexit negotiations (*see blue box next page*). Prime Minister May effectively warned European leaders that the UK was prepared for a “hard Brexit,” as reflected in a February 2017 white paper (*see red box on next page*).

The UK government intends that all existing EU laws will become part of UK domestic law on the day of Brexit, pursuant to the Great Repeal Bill, expected to be outlined in greater detail on Thursday. The legislation should provide some legal certainty by the time of the exit; however, the ensuing divorce from EU institutions and the establishment of appropriate agencies in the UK to fill the gaps will take time and cause uncertainty in the interim.

The UK government does not intend to participate in the EU single market, or be part of the Customs Union or the European Economic Area (EEA). Instead, the UK government will seek to establish new free trade agreements in goods and services, both with the EU and with individual non-EU countries. While the UK does not have any WTO schedules at this point, the UK government appears to be working towards a solution in which it would agree with other WTO members to initially apply the EU’s trading terms (schedules and commitments) with non-EU countries.

Free movement of persons from the EU into the UK will come to an end, although the white paper suggests a staged implementation, possibly with different targets for different sectors, to minimize impact on the UK economy.

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February 2017 Brexit "White Paper": The Red Lines

<p>Providing legal certainty: The government will introduce the Great Repeal Bill to remove the European Communities Act 1972 and convert existing EU law into domestic law. The British Parliament will then decide what to keep, remove or amend.</p>	<p>Taking control of own laws: The Great Repeal Bill will ensure that UK legislatures and courts will have the final say on law applying to the territory of the UK.</p>
<p>Controlling immigration: EU nationals' entry into and right of abode in the UK will fall under UK law. Government is considering options to restrict immigration from the EU.</p>	<p>Dispute resolution mechanisms: The UK will seek agreement with the EU on a new approach to the interpretation and dispute resolution.</p>
<p>Ensuring free trade with European markets: The UK will not be a member of the EU single market, bound by the EU's Common External Tariff or participate in the Common Commercial Policy. The UK government will prioritize securing the freest and most frictionless trade possible in goods and services (including financial services), between the UK and the EU.</p>	<p>The EU budget: The UK will not be required to make vast contributions to the EU budget after Brexit, but participation in some European programs may continue.</p>

May's January 2017 Speech: The UK's Wish List

<p>Certainty and clarity: The UK government plans for the same rules and laws to apply in the UK on the day after Brexit as they did before, and for the British Parliament to decide on any changes after full scrutiny and debate.</p>	<p>A stronger Britain: The government wishes to "take back control of laws" and bring an end to supremacy of EU courts and legislation in Britain.</p>
<p>Immigration control: The government wishes to control immigration from Europe into the UK.</p>	<p>Rights for EU nationals in Britain, and British nationals in the EU: The government seeks to guarantee rights "as early as [it] can."</p>
<p>The best place for science and innovation: The government wishes to continue to collaborate with Europe on major science, research and technology initiatives.</p>	<p>Free trade with European markets: The government has signalled an end to EU single market access for UK companies as it is likely incompatible with migration controls. The UK is seeking a new free trade agreement with the EU, but has excluded seeking membership of the EU customs union or the EEA option.</p>
<p>A phased approach: The government wishes to achieve a smooth, orderly Brexit including a phased process of implementation.</p>	<p>New trade agreements with the rest of the world: The UK will seek to build trading relationships with non-EU countries as part of a "global Britain" strategy.</p>
<p>Protect workers' rights: The UK wishes to build on safeguards set out in European legislation.</p>	<p>Cooperation to fight crime and terrorism: The UK will seek to cooperate with European countries on foreign affairs and security.</p>
<p>Maintain the Common Travel Area with Ireland: The government will seek to deliver a practical solution while protecting the integrity of the UK's immigration system.</p>	<p>Strengthen the Union: The UK will seek to protect the "United" aspect of the relationships between England, Wales, Northern Ireland and Scotland.</p>

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Deregulation versus regulation

During the referendum campaign, minimizing EU regulation and bureaucracy was a major theme for the Leave Vote. The Great Repeal Bill is the UK government’s attempt to “take back control.” EU laws will become part of UK laws, and the British government will trawl through these laws to decide what to keep, amend or remove. However, UK businesses wishing to operate in the EEA and EEA businesses wishing to operate in the UK will have to continue to comply with EU regulations *and* the new post-Brexit UK domestic legal regime. Over time, divergences between the two will emerge, creating parallel regimes and institutions.

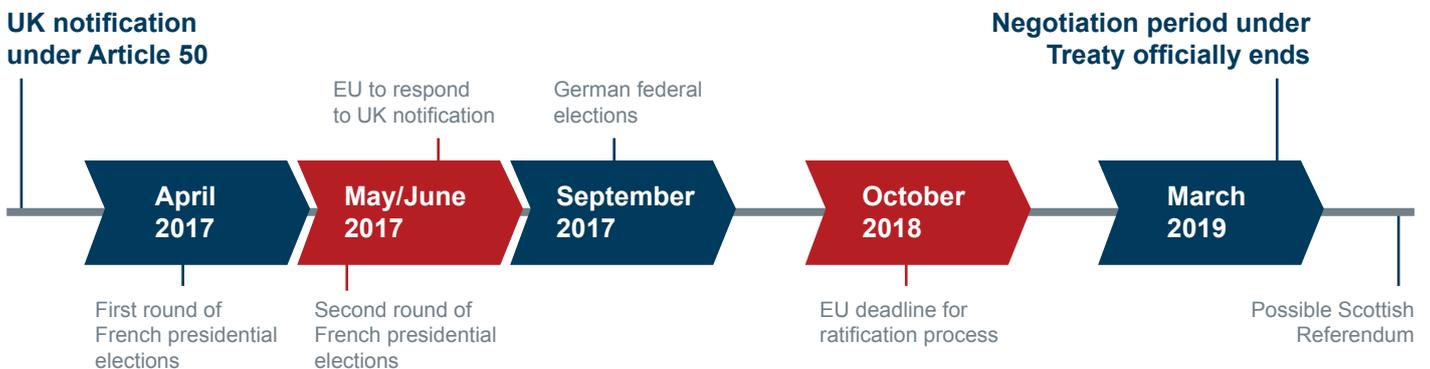
Where does the EU stand on Brexit?

The EU has not responded to the UK’s Brexit wish list. In fact, the EU 27 and European institutions stated they would not discuss any exit deal or new relationship with the UK prior to the Article 50 notice being given. With the Article 50 notice now triggered, the position of the EU 27 and the individual Member States will become clearer as the European Council formulates its responses.

The UK’s long and ambitious Brexit wish list focuses on the position of the UK without mentioning implications for the EU. Some obvious tension points exist between the two: a possible divorce bill of up to €60 billion to settle the UK’s outstanding liabilities under various EU agreements; the status of EU nationals in the UK and UK nationals in EU Member States; trading terms between UK and EU companies and financial institutions; dispute resolution issues, such as recognition of choice of law and choice of jurisdiction, and EU-wide enforcement of judgments; the question of the supremacy of the European Courts, namely the Court of Justice of the European Union consisting of the European Court of Justice and the General Court.

The upcoming general elections in France and Germany add further complexity to this picture, as does the possibility of a second Scottish referendum on independence from the UK. Concerns around the potential contagion effect of Brexit and anti-EU sentiments and political developments during the Brexit negotiation period are likely to bear on the process (*see timeline below*).

Brexit Timeline — Now and Expected



On the one hand, “giving in” to the UK’s requests and making an apparent “success” out of Brexit is arguably not in the EU’s interest as a bloc. But equally, some believe that Member States should and will take a commercial and realistic view and work out a deal that is best for everyone, as opposed to making an “example” out of the UK. Many complex factors will determine the final arrangements, as in any international negotiation. In other words, a “hard Brexit” could become a reality for reasons outside the UK’s control.

What does a “hard Brexit” mean?

If the UK and the rest of the EU do not agree on the terms of the UK withdrawal or extend the negotiating period, then two years from now, on the second anniversary of the UK’s Article 50 notice, EU treaties will cease to apply to the UK. At that point, the UK government intends to use the Great Repeal Bill to re-enact some or most of the then existing EU legislation in the UK. The situation with respect to pending trade negotiations is less clear. While the UK government intends to apply EU’s trading terms (schedules and commitments) to non-EU countries upon the effectiveness of Brexit, that outcome requires agreement with trading partners.

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What can you do to prepare for Brexit?

Loss of access to the EU single market will be a set-back for some businesses and industries. Businesses that use the UK essentially as a platform for accessing the EEA may need to relocate some operations to continue to benefit from the EU single market (see box below). Brexit contingency planning and budgeting for monitoring and review, both in terms of managing operational and legal risks, should continue to be a key agenda for businesses operating in or from, or trading with, the UK.

Brexit Contingency Planning for UK Operations: An Overview of Issues			
Operational risks	Legal diligence	Documentation and disclosure	Industry-specific concerns
<ul style="list-style-type: none"> Market volatility and currency fluctuations Loss of access to EU single market and EU-wide authorizations Establishing and implementing arrangements for compliance with parallel legal regimes Impact on staffing and recruitment from the EU Potential additional tax costs arising from loss of EU directives exempting withholding tax in jurisdictions where UK double tax treaty is less favorable 	<ul style="list-style-type: none"> Identifying products and services affected by loss of EU passporting and other single market authorizations Planning for new EU-based licensed subsidiaries or moving out of the UK, as appropriate Consider impact of WTO or other interim trade arrangements on existing arrangements Consider risks with UK government funding of operations under EU state aid rules and WTO countervailing duty rules Prepare for parallel, duplicative regulatory regimes (e.g., merger control) Consider impact of loss of EU harmonization and mutual recognition of laws and regulations 	<ul style="list-style-type: none"> Impact on choice of English law and courts in new contracts, and recognition and enforcement of English judgments in the EU and vice versa Consider any Brexit-specific events of default in new contracts and appropriate disclosures in offering memoranda Consider impact of Brexit on existing contracts, including material adverse effect and force majeure provisions Consider prospectus disclosure and ongoing material information disclosure requirements on stock exchanges and in annual reports Review references to "EU" legislation and terms in existing and new contracts to cover UK and EU as appropriate 	<ul style="list-style-type: none"> End of EU passporting for financial services firms, with no clarity on new/existing third country equivalence measures Loss of EU funds, research grants and aids; pharma industry and media may be particularly affected UK pharma industry may no longer attract EU researchers and doctors Possible loss of EU-wide approvals for clinical trials, drugs and new medical devices Automotive and manufacturing sector may be affected by additional costs from new border controls and related higher cost logistics chains Airlines and land transit firms may lose access to single aviation space and land transport transit freedoms

Conclusion

The UK has an ambitious objective for Brexit as set out in Prime Minister May's January 2017 speech. But it is not for the UK alone to make these decisions, and at the moment, there is no way to predict what will be the outcome of the Brexit negotiations (or of trade negotiations with non-EU countries).

Many factors can have an impact on the outcome of these discussions: the state of the global economy; the outcome of the German and French elections; and whether the UK is able to reach successful deals with major non-EU economies, such as the US, China and Japan, to name a few. What seems certain for the moment is that regardless of whether a deal, and if so, what kind of deal, is struck, there will be no turning back: the UK is leaving the EU.

Contacts

If you have any questions about this *Briefing Note* or assistance that Latham can provide in contingency planning for Brexit, please contact the Latham lawyer with whom you usually consult.

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