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The legal implications of Brexit

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What we know for certain about Brexit



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Brexit – what is happening



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- Article 50 was triggered on 29th March 2017
- 2 year deadline to agree a Brexit deal
- The letter from Theresa May indicated that:
 - she will be seeking a ‘hard Brexit’
 - the status of EU citizens in the UK, and UK citizens in Europe should be ‘at the heart of discussions’;
 - both sides should work to minimise disruption and give certainty to investors businesses and citizens.....that doesn’t seem to have happened yet!

Brexit – what is a ‘hard Brexit’?



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- **Hard Brexit**
 - Britain leaves both the single market and the joint customs union; and
 - seeks to negotiate a limited free trade deal with the rest of the EU;
 - Britain stops paying money into the EU budget;
 - gains control over its borders
 - Financial firms lose the right to do business in the rest of the EU;
 - Customs checks reintroduced at border check points (including between Northern Ireland and the Republic)

Brexit – what is a ‘soft Brexit’?



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- **Soft Brexit**
 - Britain stays in the single market and possibly the customs union;
 - Some sort of deal is done over freedom of movement;
 - There may still be contributions to the EU budget in return (something like either Norway or Switzerland)

Brexit – the possible trade deal



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- Interestingly, the ECJ has recently ruled that a future trade deal would not necessarily need unanimous consent of all members states

Brexit – English law post-Brexit



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- Within the UK, the Government is proposing the ‘Great Repeal Bill’
 - Where possible, the law that comes into effect the day the UK leaves will convert existing EU law into UK law;
 - Amendments to those laws can then be passed after that;
 - The European Court of Justice will have no jurisdiction in the UK;
 - There is a danger that secondary legislation may be used to pass significant changes without proper Parliamentary debate

Brexit – the United Kingdom



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- Both Scotland and Northern Ireland voted to stay in the EU, and certainly Scottish politicians have been raising the prospect of a further referendum on remaining part of the UK.
- However:-
 - There is no guarantee that Scotland would gain entry to the EU (because of the state of its finances); and
 - 63% of its 'exports' are to England and only 16% to the rest of the EU.
- The vote, and the potential hard Brexit, raise the possibility of a united Ireland.

Brexit –what will be affected?



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- Tax
- Treaties
- Terms of business
- Trade
- Travel
- Banking and finance – Europe’s major Stock Exchange (and no financial passporting).

Brexit – the legal implications?



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- Difficult to predict but:
 - The Great Repeal Bill may make significant changes to the law that is currently in place so:
 - Advice on UK law may be more necessary as it will not necessarily be compliant with EU law;
 - UK businesses trading in Europe will almost certainly need to ensure that their contracts incorporate the important elements of EU law (as they do now);

Brexit – the legal implications?



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- UK businesses trading with EU businesses will probably need to guarantee compliance with certain elements of EU law (for instance Data Protection and the GDPR)
- EU Companies trading in the UK may find that the protection they are used to doesn't exist any more
 - e.g. the agency regulations

Brexit – the legal implications?



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- Contractual relationships will need to be reviewed for some or all of the following:
 - Might Brexit trigger a force majeure provision?
 - Does the contract rely upon free movement of people within the EU (especially service providers)? That may lead to frustration of the contract or may constitute force majeure.
 - Is the territorial scope defined as the EU? How will that be affected by the carve out of the UK?

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- What effect may regulatory/legislative change have upon the performance of the contract?
- Will the contract be enforceable? Although Rome I will not govern the position, English Common Law is similar, but for non-contractual obligations, Rome II doesn't reflect Common Law as closely.



- Employment

- The Great Repeal bill (or at least subsequent amending legislation) may alter employees' rights in such areas as;

- Working time regulations;
 - Redundancies and the transfer of undertakings;
 - Migrant workers



• Intellectual Property

- PDOs (Protected Designations of Origin) will no longer protect UK goods such as Cheddar Cheese, Stilton Cheese or Newcastle Brown Ale
- EU trade marks may no longer be protected in the UK, so if relying on an EU mark in the UK, clients should consider filing a national UK trade mark application. There may be some sort of ‘conversion’ process – indeed there is ‘widespread confidence’ among IP professionals that there will be (perhaps misplaced).
- European patent applications are not likely to be affected significantly as generally European patents operate nationally.

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- However, the Supplementary Protection Certificate process will be affected and, given the importance for UK life sciences, the Government will need to move fast to negotiate to allow them to continue to be effective.
- The UK Government may not ratify the Unified Patent Court project
- Designs will be affected in the same way as trade marks, and there may not be the ability to re-register in the UK as registration in the UK requires the design to be ‘new’
- Copyright will probably be the least affected
- IP licences will therefore need to be reviewed to look at necessary changes

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- Property
 - The market has slowed somewhat (both commercial and residential investment properties) post-Brexit as (probably) investors wait to see what happens
 - Generally, there will be few legal implications of Brexit to property law itself, or transactions, as there is no harmonisation of property law
 - But what effect may Brexit have upon EU Banks lending upon the security of UK Property?

Brexit – the legal implications?



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- All of this is likely to take a long time:
 - 20,833 EU laws to be scrutinised to determine any changes
 - 43 years of treaties to be reviewed and renegotiated (although we don't have anyone who has negotiated a treaty still working!);
 - Until then, once the Great Repeal Bill has enacted all of the existing EU law into our legal system, that will apply

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- All of the contractual arrangements between the UK and EU businesses will need careful scrutiny on both sides to ensure that:
 - They are effective and legally enforceable in both jurisdictions;
 - They take account for, or provide a mechanism to deal with, any changes to UK (or EU) law in the immediate future

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Panel discussion