Analysis

# Brexit: the legal mechanisms for a UK exit from the EU


## Speed read

**Article 50 of the Treaty of the European Union sets out the broad mechanism for withdrawal of a member state from the EU. The effect of its provisions is that, if the UK notifies the Council of an intention to withdraw and no withdrawal agreement is reached within a two-year period, nor an extension agreed, the UK would, in effect, exit the EU automatically at the expiry of the period and would cease to be bound by the Treaties. The Treaties provide very little guidance about the legal consequences of withdrawing from the EU or what the post-exit world would look like for a departing state. Options for the UK's post-Brexit relationship with the EU would appear to include: a 'Norwegian model'; a 'Swiss model'; a customs union (along the lines of the EU's current relationship with Turkey); a free trade agreement (e.g. of the type negotiated with Canada); or simply remaining a member of the World Trade Organisation (WTO). Whichever model is adopted, the legal landscape post-Brexit would change. The extent of the change would depend not only on which model is adopted, but also on the way in which particular EU laws have been implemented in the UK. Businesses should follow developments closely so that, as matters begin to become clearer, appropriate steps can be taken to mitigate any risks and take advantage of any opportunities.**



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The European Union is governed by two Treaties, the Treaty on the Functioning of the European Union (TFEU) and the Treaty of the European Union (TEU). In this article, we analyse three aspects of the Brexit debate which involve the EU's legal foundations under these Treaties.

First, we consider possible mechanisms under the EU Treaties for the UK to exit the EU. Notwithstanding the EU Treaties anticipating 'ever closer union' between members, they do expressly contemplate a member state leaving. As has been widely reported, under the terms of the relevant Treaties, the UK would have to give two years' notice of its intention to exit, during which period the terms of its departure would be worked out.

Secondly, we explore the possible shape of the UK's relationships with the remaining member states following an exit from the EU. There is uncertainty as to what regime a UK government might ultimately be able to put in place. In part, this is because those in the 'leave' camp advocate a variety of models. But it is also because it is unclear whether the UK government will be able to reach agreement on its preferred model with the EU (and, potentially, others). If the UK wishes to join another club, it will need the consent of that club's members. Whether this will be achievable against the backdrop of the political fallout that the vote to leave the EU has created depends in large part on the political will and negotiating power (or perceived negotiating power) of the relevant parties.

The options would appear to include a 'Norwegian model', a 'Swiss model', a customs union (along the lines of the EU's current relationship with Turkey), a free trade agreement (e.g. of the type negotiated with Canada), or simply remaining a member of the World Trade Organisation (WTO). Given the uncertainty as to which model will be adopted, we outline the key features of each of the main options, rather than providing an in-depth analysis of every possible arrangement.

Thirdly, we explore what the legal landscape may look like following a UK exit from the EU. In doing so, we seek to assess the extent to which a vast array of EU legislation would be binding on the UK if it chooses to leave the Union.

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### What do the EU Treaties say about exit?

Although the member states have expressly ceded certain competences to the EU, the Treaties recognise that those member states must be free to 'reclaim' those competences and leave the Union.

Article 50 of TEU contains an express provision allowing a member state to exit from the EU. It provides, in part, that: 'Any member state may decide to withdraw from the Union in accordance with its own constitutional requirements'.

Article 50 also sets out the broad mechanism for withdrawal. In particular, it provides that:

- within two years of a member state notifying the European Council (the Council) of its intention to withdraw from the EU, the EU 'must negotiate and conclude an agreement with that member state, setting out the arrangements for its withdrawal and taking account of the framework for its future relationship with the EU' (article 50(2)(b));
- that withdrawal agreement is to be signed by the Council, acting by a qualified majority, and after obtaining the consent of the European Parliament, acting on a majority vote basis (article 50(2)(c)); and
- the Treaties would cease to apply to the withdrawing state from the date of entry into force of the

withdrawal agreement or, failing that, two years after the notification of the state's intention to leave unless the Council, in agreement with the withdrawing state, unanimously decides to extend this period (art 50(3)).

- An exit from the EU under article 50 would not therefore necessarily require the consent of all member states, although in practice such consent might be necessary if the withdrawal arrangements went further than simply dealing with how the UK extracts itself from EU membership and covered matters in relation to which unanimity is necessary and which may potentially require compliance with member states' constitutional rules (e.g. a new free trade agreement).

The effect of these provisions is that, if the UK notifies the Council of an intention to withdraw and no withdrawal agreement is reached within the two-year period, nor an extension agreed, the UK would, in effect, exit the EU automatically at the expiry of the period and would cease to be bound by the Treaties.

The timing of the delivery of any withdrawal notice to the Council will therefore be important if the UK wants to avoid a unilateral exit, given the fact that the negotiation of the withdrawal agreement is likely to be complex and time consuming. The UK government may wish to lay the groundwork for these important negotiations before delivering such a notice. Neither the Treaties nor the UK legislation governing the referendum specify the timing for its delivery (indeed, the referendum is strictly advisory so there is no formal requirement under the UK rules to deliver a withdrawal notice following a 'leave' vote). This would essentially be a political decision, and one that may require the approval of Parliament.

Whenever a withdrawal notice is given, the UK would, at least in theory, continue to be bound by EU law during the period between delivery of the notice and Brexit itself, unless a different arrangement was agreed. The UK government may be unlikely to be in a hurry to implement new EU laws passed during this period, however, and its ability to influence the negotiation of legislation may be significantly diminished.

The Treaties provide very little guidance about the legal consequences of withdrawing from the EU or what the post-exit world would look like for the departing state

### What are the possible post-Brexit models?

Significantly, the Treaties provide very little guidance about the legal consequences of withdrawing from the EU or what the post-exit world would look like for the departing state (and remaining members). Existing models for the EU's relations with non-member states suggest that there are a range of arrangements that could be agreed if the UK decided to leave the EU, from the 'EU-lite' precedent set by Norway, with its EFTA and EEA membership, through various levels of economic integration and cooperation with the EU, to the UK 'going it alone' at the other end of the spectrum. The principal options are discussed in further detail below.

There are a number of general points to note in relation to what the existing models might be able to tell us about the likely shape of the UK's post-Brexit relationship with the EU. In particular, these models show a clear correlation between the level of access that non-member states have to the EU's single market and the extent to which they are required to comply with EU law, agree to free movement (of people, goods, capital and services) and contribute financially to the EU budget.

#### What is the European Economic Area?

The European Economic Area (EEA) brings together the 28 EU member states plus Iceland, Norway and Liechtenstein (i.e. all EFTA states minus Switzerland) in a single market. The EEA agreement provides for the adoption of EU legislation covering the four freedoms – the free movement of goods, services, persons and capital – throughout the 31 EEA states. In addition, the EEA agreement covers cooperation in other important areas such as research and development, education, social policy, the environment, consumer protection, tourism and culture, collectively known as 'flanking and horizontal' policies. Each EU member state must be a party to the EEA agreement and EFTA members may accede to it. For the UK to re-join the EEA post-Brexit, all members would need to agree.

#### What is the European Free Trade Association?

The European Free Trade Association (EFTA) has four states as members: Switzerland, Iceland, Norway and Liechtenstein. EFTA is an intergovernmental organisation set up for the promotion of free trade and economic integration, originally intended as a way to achieve the benefits of trade with the (then) EEC without full membership. EFTA manages a network of worldwide free trade agreements and is governed by the Convention Establishing the European Free Trade Association. Any state can accede to the EFTA Convention upon approval of the EFTA Council and with the consent of all EFTA member states.

There are various ways in which a post-Brexit model could be documented. For example, the agreement as to the UK's withdrawal from its existing relationship with the EU could be documented separately from any agreement(s) as to its future relationship. Alternatively, a single agreement could be put in place covering both the withdrawal agreement and any further agreement as to the new relationship.

#### 1. EEA: the Norwegian model

Assuming the necessary agreement/approvals could be obtained (and the UK becomes an EFTA member as required under the EEA agreement), the UK could leave the EU but join the EEA as a non-EU member state member, like Norway.

This option would be closest to the UK's current relationship with the other EU member states and would retain the UK's place within the single market. Therefore, it would minimise the practical consequences of Brexit to the greatest extent. However, it may be the least politically appealing option as it would not allow the UK to disengage itself from some aspects of the EU legal regime that are unpopular among many in the Brexit camp (e.g. it would require the UK to permit free movement of people). It would also require a significant financial contribution from the UK.

If this approach was followed, the UK would be bound to apply a significant volume of EU law in a range of fields including in relation to financial services, employment and certain consumer protections. While remaining bound by EU law, however, the UK would not have a formal seat at the table when EU law is drawn up.

There would be some EU legislation that the UK would no longer be required to apply if it followed this model, which may mean that the UK would have to enact domestic legislation in its place. Notably, as an EEA member, the UK could set its own rules in areas such as agriculture and fisheries, transport and energy.

### 2. The Swiss model

The UK might alternatively seek to adopt a model along the lines of the current Swiss model (albeit that this model was initially intended as a transition to full EU membership), with its many bilateral agreements with the member states and limited access to the single market in specifically defined areas. The UK may also seek to become an EFTA member, like Switzerland.

This model would require more detailed negotiation than the Norwegian model as bespoke terms for access to the single market would have to be agreed. It may well also require the UK to accept at least some of the EU's rules on freedom of movement and to comply with EU rules when trading within the market, again without a formal seat at the table when those laws are drafted. Also, if the Swiss model was adopted literally, freedom of movement of services would be limited. This model would also require a financial contribution from the UK. It is understood that the Swiss arrangement is not a popular model in Brussels due to its complexity and so there may be limited enthusiasm for agreeing to a similar arrangement for the UK.

The Norwegian model would minimise the practical consequences of Brexit to the greatest extent. However, it may be the least politically appealing option

### 3. Customs union: the Turkish model

It may be that the UK will have little appetite for joining any new 'club' along the lines described above. However, it is unlikely that the UK would not try to retain at least some form of arrangement with the EU.

One such arrangement currently in existence is the customs union between the EU and Turkey. Under this model, which applies only to trade in goods and not services, no internal tariffs are applied to trade between Turkey and the EU and there are common external tariffs for trade with third states.

If the UK adopted this model for trading with the EU, it would not have to make a financial contribution to the EU budget and would not be bound by the majority of EU law and would therefore have to legislate to fill the significant gaps in its national legislation that would be left upon exit. Nor would it have access to the market in services via such an arrangement. However, a formal customs union would not, in practice, be likely to achieve a total break from the EU legal regime. The EU and the UK would have to agree rules on trade which would in reality be highly likely to require the UK to adopt the relevant EU rules (e.g. on the standards applicable to goods entering the single market) without any ability to influence the setting of those rules or their interpretation by the EU courts.

### 4. Deep free trade agreement: the Canadian model

Alternatively, the UK may seek to negotiate an extensive free trade agreement and may look to the EU/Canadian free trade agreement, which has been agreed but is not yet in force. The Canadian deal (which took over seven years to negotiate) allows tariff free trade in goods (subject to complex country of origin rules) and provides for the removal of certain non-tariff barriers in relation to both goods and services, including financial services. Under such a model the UK would retain control over tariff arrangements with other (non-EU) countries.

### 5. WTO membership: UK alone

This model would simply lead to:

- the application of caps on tariffs applicable to goods traded between the UK and the EU; and
- limits on certain non-tariff barriers in relation to goods and services.

It would therefore represent the greatest change from the status quo. It would not apply to services and may well require substantial amounts of new legislation to replicate EU legislation that would fall away on Brexit. The UK would not be required to make any financial contribution to the EU, however, nor would it be bound by EU laws.

## The UK's legal landscape on Brexit

### The UK's domestic affairs

Whichever model is adopted, the legal landscape post-Brexit would change. As noted above, this change would be most stark if a WTO model was followed, but even adopting the Norwegian model would mean significant areas previously occupied by EU law (such as agriculture) would need to be addressed.

As well as being dependent on the model that is adopted, the extent of the change in the legal landscape on Brexit (and the mechanism by which it will be achieved) will depend in part on the way in which particular EU laws have been implemented in the UK. For example, where EU laws (broadly, European Directives) have been implemented via primary legislation in the UK, that legislation will remain part of English law on Brexit, unless it is amended or repealed. Conversely, EU laws that have direct effect in the UK without the need for implementing legislation (broadly, European regulations) would fall away on Brexit unless legislation was passed transposing those laws into UK law. There have also been over 5,000 statutory instruments (SIs) made pursuant to the European Communities Act 1972 (the Act). If the Act is repealed upon Brexit then, without more, those SIs would also fall away (although in practice the UK government may seek to legislate to retain any SIs it considers beneficial to the UK).

There would be a number of difficult issues that the UK government would have to grapple with when legislating for Brexit, including:

- **Transitional arrangements**: Although there will be a two-year (or longer) transitional period between any vote to leave the EU and Brexit itself, unless the post-Brexit model is agreed far enough ahead of Brexit to allow the UK government to make all necessary legislative changes, it is likely that the UK government

will need to put in place additional transitional arrangements in the run-off period immediately post-Brexit, for example allowing EU law to continue to apply for a limited period while the UK government takes steps to fill the legislative gaps. (Greenland and the (then) EC had such a transitional period when Greenland exited in 1985.) However, while a seemingly neat solution in theory, it does raise questions regarding how these obligations would be policed during the run-off period (and, indeed, as to who would police the law as it applied pre-Brexit).

- **Filling the legislative gaps**: The UK government would need to legislate to fill the gaps in the legal regime created by Brexit, either by adopting pre-existing EU measures into domestic law (and amending them where necessary) or by introducing wholly new measures (the latter option in itself may be considered to be a further source of uncertainty).
- **Managing logistics**: If the UK wished to ensure that some but not all existing EU legislation forms part of UK domestic law on Brexit, it might carry out a pruning exercise, considering each piece of EU legislation separately to decide whether it should continue to apply and, if so, whether any amendments should be made. This would inevitably be a complex and time-consuming exercise. Alternatively, the government may decide to legislate in bulk, for example by introducing a single statute which would incorporate all EU regulations into primary UK law. But even this approach would not be straightforward. For example, consideration would need to be given to how references to European institutions and courts should be construed and how to deal with instruments that cannot be adopted unilaterally (e.g. those predicated on reciprocity).
- **Vested rights**: It may be that some parties will seek to argue that certain EU-law derived rights have vested in them as a matter of national or international law, such that those rights cannot fall away on Brexit. Conceivably, reliance may also be placed on arguments under investment treaties between the UK and other member states or on human rights legislation.

On any assumption, it is clear that significant transitional measures and domestic legislation will be required to clarify the position post-Brexit. However, while the UK government is in a position unilaterally to decide upon the UK's domestic law, the impact of Brexit upon the UK's external relations with other member states will be more complex to address.

### What is the impact on Fundamental Rights and Human Rights?

The Charter of Fundamental Rights forms part of the EU Treaties and would cease to apply to the UK upon exit from the EU. It applies to member states when implementing EU law and is enforced by the EU courts in Luxembourg.

Separately, the European Convention on Human Rights is an international treaty which the UK signed up to as a member of the Council of Europe. It is not an EU instrument and is enforced by the European Court of Human Rights in Strasbourg. It was incorporated into domestic law by the Human Rights Act 1998 and will not be affected by the UK exiting the EU.

The other important point to bear in mind is that if an exit is agreed between the member states, it may be that supplementary EU law is passed dictating the approach that member state courts should take to the UK post-Brexit.

### The UK's non-EU external relations

The UK is currently bound by a number of international agreements concluded on its behalf by the EU. What would happen to those agreements post-Brexit?

Since the Lisbon Treaty (TFEU article 216(2)), the EU has had express competence to enter into, and has in fact entered into, a number of agreements with non-EU states on behalf of member states. Whether the UK will remain bound by international agreements with non-member states is likely to depend on how the agreement was signed (i.e. whether it was signed by the EU or the UK or both) and whether the subject matter was within the EU's exclusive competence. If the agreement covers a matter which is within the exclusive competence of the EU (either expressly or impliedly – see article 3(1) and 3(2) TFEU) and was signed solely by the EU, then the UK would no longer be bound on Brexit. If the UK wanted to be a party in its own right it would have to sign itself or alternatively make its own arrangements. The EU's exclusive competence covers substantial areas such as the common commercial policy, i.e. trade with third states, and competition law.

> The extent of the change in the legal landscape on Brexit … will depend in part on the way in which particular EU laws have been implemented in the UK

The UK government would need to assess which international obligations have been assumed by the EU, identify the gaps that would arise post-Brexit and then take steps, where appropriate, to negotiate replacement agreements. This is likely to be a complex exercise. Moreover, it will not be a purely legal exercise – international instruments cannot be negotiated in a vacuum. To replace existing free trade agreements that the UK may not benefit from upon any Brexit, the UK would have to persuade other governments that it is worth the effort.

### Final thoughts?

This article provides a high level overview of EU exit mechanisms and the range of potential post-Brexit regimes. We have highlighted the core areas of uncertainty and flagged some areas where there may be a post-Brexit legislative overhaul. Understanding these issues will assist commercial parties in their contingency planning. However, the fact that there are significant uncertainties as to the post-Brexit regime emphasises the difficulties of making any firm assumptions or taking concrete steps at this stage. It also highlights the importance to commercial parties of following developments closely so that, as matters begin to become clearer, appropriate steps can be taken to mitigate any risks and take advantage of any opportunities. ■

*With acknowledgement to the contribution from Maeve Hanna, associate at Allen & Overy.*