

# A briefing to clients in Ireland and Northern Ireland on the Brexit withdrawal process

On 23 June 2016, voters in the United Kingdom (UK) chose to withdraw the UK from membership of the European Union (EU). It is unclear at this early stage what the legal implications of Brexit will be for businesses in Ireland and Northern Ireland.

However, those implications are unlikely to be immediate because of the lengthy process for the withdrawal of the UK from the EU and the need for the UK and EU to agree what form the post-Brexit EU/UK relationship will take. In addition, there will be much debate in the UK on what EU laws it will repeal and preserve. In that regard, businesses and investors in Ireland and Northern Ireland will want to conduct contingency planning for the future to minimise risks.

A&L Goodbody will be monitoring such legal implications for businesses in Ireland as well as Northern Ireland and we will update you as and when those implications become clearer. This briefing is designed to outline the legal basis of Brexit the possible future shape that the eventual UK/EU legal relationship could take.

## What is the legal basis for Brexit?

Brexit is the voluntary withdrawal by citizens of the UK from the EU. The Treaty on European Union (TEU) provides for a withdrawal mechanism in Article 50 which sets out a two-year time-frame for such withdrawal. While there is some debate as to the timing of any activation by the UK of Article 50, it is still the most likely process by which Brexit will be implemented. The relevant sections of Article 50 provide that:

“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.

5. 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.”

## How long will it take for the UK to leave the EU?

Article 50(3) provides that 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 [Article 50(2)], unless the European Council, in agreement with the Member State concerned, unanimously decides to extend this period.” Two years could be an optimistic time-frame to negotiate and legislate for the withdrawal and a transition-type arrangement may well be agreed.

If the UK notifies the European Council of an intention to withdraw and no withdrawal agreement is reached within the two-year period (and no extension is agreed), the UK could withdraw from the EU at that point once the period for expiry has been reached and the UK would no longer be bound by the EU Treaties.

## Can the UK re-join the EU?

Yes. Articles 49 and 50(4) provide a mechanism for the UK to re-join the EU.

## What will happen next?

If the UK applies the Article 50 mechanism to terminate its membership of the EU, negotiations will begin on the provisions of its withdrawal from the EU. When agreement is reached, it must be passed in the EU Council of Ministers by qualified majority vote as well as in the European Parliament and in the UK Parliament. The UK Parliament must decide what EU laws it intends to preserve, what should be modified and what should be repealed (which we discuss below).

## What are the possible post-Brexit options for the UK's relationship with the EU?

Possible post-Brexit options for the UK's relationship with the EU offering differing levels of co-operation with the EU include:

### (i) Join the European Economic Area (i.e. the Norwegian model)

The UK could seek to join the Agreement on the European Economic Area (EEA Agreement), which entered into force on 1 January 1994 and which brings together the Member States of the EU and three of the European Free Trade Association (EFTA) Member States (i.e. Norway, Iceland and Liechtenstein) in a single market, referred to as the “Internal Market”. The EEA Agreement provides for the inclusion of EU legislation covering four freedoms (i.e. the free movement of goods, services, persons and capital) throughout the EEA Member States. In addition, the EEA Agreement covers cooperation in other areas such as research and development, education, social policy, the environment, consumer protection, tourism and culture. The EEA Agreement guarantees equal rights and obligations within the Internal Market for citizens and economic operators in the EEA. This would involve some (though more limited) engagement with the EU.

This option would maintain the UK's place in the single market but the UK would not be disengaging itself from the EU, would entail a financial contribution from the UK, would require the continued application of very significant elements of EU law by the UK and would exclude the UK from any formal say in EU affairs affected by the relationship. On its face, this option seems unlikely as it would involve the UK continuing to accept some fundamental tenets of EU law (including free movement of persons).

#### (ii) The Swiss model and the European Free Trade Agreement

While Switzerland is not a member of the EU or the EEA, it has around 129 bilateral treaties to govern its commercial and other relations with the EU (e.g. for Switzerland to participate in specific EU policies and programmes such as insurance, pensions, air traffic control and fraud prevention). Switzerland is also a member of EFTA. EFTA is an intergovernmental organisation set up for the promotion of free trade and economic integration to the benefit of its four Member States (i.e. Switzerland, Norway, Iceland and Liechtenstein). EFTA provides for free trade arrangements with the EU in a number of areas.

The Swiss model would maintain the UK at a greater distance than under the EEA model and allow for an à la carte approach to such a UK/EU relationship. However it would require significant negotiation with the EU as specific terms for access to the single market would need to be agreed. The UK may also need to accept some of the EU's rules on freedom of movement and to comply with other EU trading rules when trading without any formal say in related EU affairs. Due to the complexity of the Swiss bilateral agreements, the Member States of the EU may not be willing to replicate this structure with the UK.

#### (iii) A Customs Union with the EU

The UK may negotiate a customs union (similar to the relationship between the EU and Turkey). A customs union for the UK with the EU may involve trade in goods between the UK and the EU being tariff-free, irrespective of the country of origin of those goods. Members of a customs union impose the same level of tariff on imports from countries outside the customs union.

The UK would not have to make any formal financial contribution to the EU or comply with most EU laws. However, the UK would not have access to the EU services market. An agreement on trading rules would likely be required for the adoption of the relevant EU rules by the UK (e.g. on standards on goods supplied to the EU) and the UK would have no formal say in relevant EU policies.

#### (iv) A free-trade agreement with the EU

The UK could seek to negotiate a free trade area with the EU similar to the free-trade agreement (i.e. the Comprehensive Economic and Trade Agreement (CETA)) between the EU and Canada (yet to be ratified). CETA is designed to remove customs duties, end restrictions on access to public contracts, open-up markets to services and prevent illegal copying of innovations and traditional products.

A similar model would allow trade in goods without tariffs and the removal of certain non-tariff barriers in relation to goods and services. However, there would be less access for the UK to the single market in the EU and less influence over single market rules in the EU.

#### (v) The World Trade Organisation

Without a particular post-Brexit relationship with the EU, the UK's trade with the EU and most of the rest of the world would be governed by the World Trade Organisation (WTO). The WTO is an international

organization dealing with the rules of trade between nations based on agreements, negotiated and signed by most of the world's trading nations and ratified in their parliaments. Under the WTO rules, each WTO member grants the same 'most favoured nation' market access, including charging the same tariffs, to all other WTO members. Exceptions are that countries can choose to enter into free trade agreements (such as the EU or EFTA) and can give preferential market access to developing countries.

While the UK would be able to negotiate trade deals independently of the EU, UK exports to the EU would be subject to the EU common external tariff, the UK would be required to comply with EU product standards and trade in services may be constrained by non-tariff barriers.

### Implications for the UK's external relations outside the EU

In addition, other complicating factors such as the need for the UK to renegotiate trade agreements with third countries and organisations outside the EU may affect the shape of the post-Brexit EU/UK relationship.

The UK is, like all Member States of the EU, a signatory in its own right to free trade agreements concluded both by the EU and its Member States because they are covered partly by the EU's exclusive competence and partly by Member State competence. However, commitments concerning trade in such agreements have been taken solely by the EU due to its exclusive competence on trade. Therefore, post-Brexit, the trade aspects of these agreements would no longer be legally binding for relations between the UK and the non-EU countries that had signed them (around 60 non-EU countries or organisations). The UK would need to negotiate new agreements with these countries or organisations (e.g. the US and China) and would likely have less bargaining power than the EU.

### The post-Brexit EU/UK relationship

Much will turn on the exact shape of the eventual post-Brexit EU/UK relationship as well as the way in which the UK decides to preserve, modify or repeal EU and EU-based law in the UK. The more sophisticated and extensive that post-Brexit EU/UK relationship then arguably the less disruption there will be. The remaining Member States of the EU may however choose to agree to a more limited relationship with the UK. Such a move is likely to complicate matters for businesses in Ireland and increase compliance costs.

### Application of EU law in the UK and Brexit

During the negotiation for withdrawal, EU law will continue to apply in the UK. However, there is likely to be much debate about which EU laws the UK intends to preserve, which should be modified and which should be repealed. With some 100,000 legislative instruments adopted by the EU in its 60-year history and the application of much of that body of law in the UK (primarily through EU Regulations and EU Directives), the task will be a significant one. In particular, EU Directives (though not EU Regulations) need to be specifically implemented into the laws of each Member State. The process of unwinding, modifying or retaining the applicable implementing UK laws based on these EU Directives as part of the Brexit process will therefore be an enormous task. The task of dealing with EU Regulations (which are automatically applicable in the laws of Member States and do not require specific implementation) may be less onerous in this process. The UK will also need to consider how EU Decisions (binding on those to whom they are addressed) will be enforced post-Brexit.

## Next Steps

There is likely to be a prolonged and intensive debate on what the post-Brexit EU/UK relationship should be. Although businesses should not expect any material immediate legal changes, businesses in Ireland and Northern Ireland should review how they are dependent on the UK being a member of the EU (e.g, trade, free movement of personnel, EU grants and EU passport rights for businesses and people). The A&L Goodbody Brexit team will be monitoring the post-Brexit legal implications for businesses in Ireland as well as Northern Ireland and will update you as and when those implications become clearer.

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