



BUSINESS, LEGAL AND SOCIAL CONSEQUENCES OF BREXIT

(With focus on Spanish situation)

This insight aims to enlighten the main features of the recent exit of the United Kingdom from the European Union, analyzing the possible consequences for privates and businesses. The surprising result of the exit referendum will bring to a series of reconsiderations concerning migration, international trade, workers' rights, social security, healthcare and many other matters.

1. Article 50 of the Treaty on European Union

The procedure

The possibility for an EU Member to withdraw its participation to the Union was introduced by the Treaty of Lisbon, amending the Treaty on European Union (TEU - or Treaty of Maastricht). For the purpose, art. 50 establishes as follows:

1. Any Member State may decide to withdraw from the Union in accordance with its own constitutional requirements.

The procedure is detailed in the following paragraphs:

*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.*

According to that, any Member State has the legal right to withdraw from the EU following the procedure indicated in the article, starting with the formal notice and following with the negotiations of the terms of exit, until the final detachment from the EU.

The timetable

Art 50(3) states that even if an agreement is not reached, the UK will be effectively out of EU once the 2 years from the day of the Notice have passed.



Theoretically, the United Kingdom would have full choice over the date to start the two years period, since it is dependent from the presentation of the formal notice.

The Prime Minister, as intended in his resignation speech, stated that the decision will be taken by his successor, which will be ready to give the notice before the election of the next Parliament.

The EU Institutions, although, are showing no will to wait until it's conformable for Britain to present the notice and expressed their intention to set a deadline for September 2016.

If the notice won't be officially presented within that date, the 27 Members could start a proceeding to suspend the UK and freeze its vote rights, due to the infringement of the principle of sincere cooperation established in art. 4 of TEU.

About the duration of the procedure: it's possible, that the 2-year period set out in Article 50(3), would be extended by the mutual consent of both the UK and the EU.

2. Brexit and International Trade Treaties

The exit of UK will imply that many commercial agreements have to be re-negotiated, and that UK will have more autonomy, imposing tariffs and possibly affecting negatively the EU market.

Since by 2015 the UK exported around £134.3 Billion worth of goods to the EU, and imported goods for £223 Billion, the imposition of eventual tariffs on bilateral trade between UK and the EU after Brexit could be more damaging for EU exporters than for UK exporters.

Anyway, considering the actual political situation and the economic disadvantages that would bring to both, it's not very likely to happen.

World Trade Organization rules

After the exit of UK, the UK will be still part of the WTO (world trade Organization) and this implies the application of the tariffs thereby established, that are not higher than the ones set by the EU custom union.

The base of UK trade relationship with the EU Members would be governed by WTO rules which provide for non-discrimination in tariffs, and outlaw discriminatory non-tariff measures.

That means that even if no agreement is reached between the European institutions and the UK the European Union would apply its standard external tariff rates for non-EU Countries to imports from UK, and not higher ones.

WTO is an example of "mixed" or "shared" competence agreement, which foresees that part of the competence belongs to the EU and part of it remains with the Member States. This happens when the agreement at stake includes provisions which extend beyond the scope of



the common commercial policy or any other EU competence to conclude agreements in its own name: the negotiation of the single Member is then necessary.

That means that both the individual Member States, including the UK, and the EU itself, are parties to the WTO Agreements.

After the Brexit the UK will automatically assume rights and responsibilities in respect of 100% of its relationship with other members under the WTO Agreements.

For legal certainty purposes this could be helpful from the EU point of view, since it would imply, at least, the submission to the key principles of the WTO Agreements in dispute settlement.

Trade Agreements with non-EU countries

The UK will probably make new negotiations with non-EU members.

Even if the effective starting date of those agreements will be the final exit of the UK from the EU, the negotiations would start way sooner, to have treaties ready to enter into force immediately and avoid lacks of regulations.

The European Union already possesses free trade agreements into force, usually contracted with small countries: The treaties used to apply to the UK as a member of the European Union and with extreme probability they will keep on being applied, granting tariff free regimens.

There will be no need for new negotiation of these existing agreements, or the application of tariffs where they don't already exist.

Possibility for the UK to rejoin EFTA or the EEA

The UK is a founder member of EFTA (European Free Trade Association), but withdrew when it joined the EU (EEC at the time) in 1973.

One of the commercial options for the UK would be join it again, with effects from the day of Brexit. In this case the members of EFTA (Iceland, Liechtenstein, Norway, and Switzerland) will probably accept UK back, since it represents their largest export market.

The consequence of the UK re-joining EFTA would be to keep the existing free trade relations between the UK and the EFTA states, avoiding the risk of one of those countries exports to the UK being subject to tariffs (or vice versa). This is known as "the Swiss model"

Another possibility would be joining the EEA (European Economic Area) whose agreement incorporates substantial parts of EU legislation, making the decision of the Brexit not that drastic as expected.



3. Business Implications

Imports and exports

Brexit is capable of having a strong effect on the import-export reality from and toward UK, since the EU is the biggest export market for UK goods, representing almost the 50% of it.

How the relationships between the two blocks will be defined during the research of an agreement with the EU Institutions will be one of the focal point of the Brexit, since the regulation of trading relationships will be established in this deal.

This means that in the short to medium-term a significant uncertainty will affect businesses between the two blocks.

Fluctuations in exchange rates may also impact UK trade.

Anyway it can't be excluded the new agreement would set tariff barriers, as well as other models that have been proposed. A Norwegian model for example would imply that UK would keep observing many of the EU's regulations; meanwhile a Swiss model instead would imply that the UK would have access to the common market for the delivery of goods, but not of services.

In any case the sudden exit of the UK would leave the country out of the application of the 53 free trade agreements contracted by the EU, and a new regulation of those matters could take some time.

EU funding

Businesses that take advantage, in a direct or indirect way of funds, grants and subsidies from the EU (for example for research or innovation) will find more difficult to obtain new finances and will probably have to reconsider their business plan.

Transitional agreements for ongoing projects would have to be negotiated, and the UK would be freer in its decision to which activity wants to fund, since it will be no longer constrained by the EU state aid regime.

Employment and workers' rights

According on the model and the agreement that the UK will adopt, especially if new agreements won't fast come at hand, It could become harder for the Country to recruit, retain or move employees, which could, in the long-period, lead to the inability to provide services to customers and businesses. This effect would of course occur both ways, and also Britons in the EU would have more difficulty.

In the worst scenario (that now seems to finally vanish), British citizens currently based in the EU, and EU nationals employed in the UK could have to return to their home countries.



Another possible practical barrier for the movement of personnel and qualified experts would be represented by the change in the schemes of recognition of foreign titles. EU titles in the UK could lose their value and vice versa.

About workers' rights articles 45-48 of The Treaty on European Union recognize the right of free movement of workers within the EU, protecting them from discriminations based on their country of origin.

Therefore comes easy to believe that those rights won't be protected anymore regarding EU citizens that will decide to work in the UK that will probably have to face stricter administrative barriers and other burdens.

4. Tax Implications

VAT

As consequence of Brexit also the common VAT regulations, applicable in all the EU territory won't be applied anymore in the UK. As consequence, the way VAT is charged in the UK could change, and the Country could establish even a total different method.

The eventual divergences that could be set In the new regulation of the subject will have to take into consideration, although, problems related to double taxation and its opposite: the possibility that some situation would unintentionally fall out of the application of this tax. This will incentivize UK to keep its VAT system aligned and compatible with EU VAT.

A first visible effect of the new system to come would be probably be the VAT liability of goods moving between the two blocks, that will be taxed as "import goods".

The import will be still recoverable, but the system risks to lack of fluidity and would possibly bring to unwelcomed cash flows for the time between the expense and its recovery.

Withholding taxes

EU directives establish prohibitions in the apposition of withholding taxes on payments of royalties, interests and dividends among the same group of enterprises.

Even if after Brexit UK would not count anymore on those instruments it is expected a new regulation on the matter.

Also bilateral double tax treaties would keep on constituting an effective relief, since they usually regulated the cases where withholding taxes should be excluded.

New taxes contrary to EU law

At some point after Brexit, UK could reintroduce taxes that have been declared contrary to EU law. Stamp duties over certain kind of activity constitute a good example.



Competition Law

The UK is also to adopt competition law rules that would be contrary to the concept of state aid prohibition set in art.107 and 108 of TFEU.

On the other hand, we may see the application of anti-avoidances rules over situations and undertakings that were not previously affected by the TFEU regimen.

Spanish tax Law

In Spain several dispositions are applicable to EU residents, granting rights and possibilities precluded to the extra-communitarian ones.

EU residents could benefit of particular exemptions in the applicability of the international transparency rules established by Spanish corporate tax law.

Furthermore they benefit to lower tax rates for the revenues obtained as non-residents (including capital gain tax).

EU residents also have of the possibility, obtained through a pronouncement of the EU Court, to use the appropriate Autonomous Community law on inheritance and donations, instead of the (less beneficial) state law.

This won't be applicable anymore.

EU Fiscal regulation trend

For the UK, Brexit would imply taking back the sovereignty over fiscal matters. For the rest of the EU, the loss of a large and influential opponent could be decisive to accelerate the harmonization of corporate income taxes. This would not necessarily happen, since other Member States are against further harmonization.

5. Other affected areas

Finance

As showed in the days following the referendum, uncertainty would lead to market volatility and instability in the change Euro-Pound.

However the effect on the loan market, at least in the short and medium term, would not be consistent.

The impact would be instead more visible and imminent in the bond market.

The cost of finance will be in fact dependent by the following regulations and laws.

However, much will depend on the UK's post-Brexit relationship with the EU.



About derivatives, volatility in the financial markets would affect negatively any existing situation.

Intellectual property

The unitary discipline of the EU of intellectual property rights, such as Community Trade Marks and Community Registered Designs won't be applicable anymore to the UK. The UK Government will have to provide for new protection in order to grant that a trade mark or design from the Country would preserve its priority rights.

Non registered trademarks raise instead more uncertainties and business working in the field should register those rights as soon.

About patents, the UK will not be part anymore to the new European Unitary Patent or Unified Patent Court.

Still, the European Patent Office would keep on making European patents available, granting the protection of inventions in the UK.

Data protection

After Brexit problems could also arise in the transmission of data and the related discipline for what it concerns transfers toward and from EU.

Before the negotiations are over, companies transferring personal data between the United Kingdom and the EU would need to implement their own compliance mechanisms.

International Contracts

Brexit will have a low impact on contracts: they will remain into force, and the parties will be able to fulfill their respective obligations without the need of major amendments.

The event of the Brexit also won't trigger the application of those material adverse change clauses usually contained in M&A agreements.

The EU rules governing the choice of applicable law set out in the Rome I and Rome II Regulations will cease to have effect in the UK and the UK will need to draft new rules on the subject.

A possible way to proceed would be to reproduce the provisions of those regulations within its domestic legislation, without the reference to the authority of the Court of Justice as final interpreter (English courts will be the final interpreter)

Another way could be instead go back applying the UK previous legislation: the Contracts Act of 1990 for contractual obligations, and the Private International Law Act 1995 ("PILA 1995")



for non-contractual obligations. The impact in practice would be limited since the abovementioned acts mainly follow the same criteria (choice of law) of the EU regulations. .

Finally, the Government could decide to draft something entirely new.

Brexit should also not affect the approach that parties take around English governing law or English jurisdiction clauses in their contracts. English judgements, though, could become more difficult to enforce after Brexit.

It is possible that some contracts including clauses that explicitly refer to the EU territory (such as IT licenses, distribution and franchise agreements), would need the necessary amendment to make them applicable within the UK.

EU Law and regulations

Following a vote to exit the EU, it is still unknown in what measure the UK will keep on implementing the many Regulations and Directives that are nowadays affecting its domestic legal system.

This would be the object of the incoming negotiations and it seems likely that the UK would keep many of the current regulations.

Healthcare

Another change that Brexit will take with itself is the possible end of reciprocal healthcare arrangements, which give them free – or nearly free – treatment as EU citizens who have paid into a Member State's system. Even if other arrangements will be negotiated it is likely that the conditions (in particular for Britons in EU countries with free healthcare) will be less favorable.

6. Immigration and Right of Residence

Europeans living in the United Kingdom

The consequences of Brexit regarding immigration are still unknown, and the discordant declarations from those politicians supporting or condemning the decision taken in the referendum does not help to clarify the incoming situation.

The 3 million non-British EU citizens living in the UK will be somehow affected, even if it's too soon, in practice, to see to what extent.

Without doubt living in the UK will be more difficult for EU countries nationals, and the *status quo* is unlikely to be maintained, considering that problems related with immigration were central in the campaign sustaining the leave option.



The negotiations to come will therefore redefine in detail the rights of expats and it is still impossible to determine how deep they will be affected.

The right to reside, to work, to run a business, to possess properties, the right to access public services such as health and education, and in general the right to stay in the UK are therefore not guaranteed.

Even if the rights of EU expats in the UK will not change in a day it is suggestable to produce documentary evidence of their reason to stay to not incur in unforeseeable problems. For this reason EU citizens concerned about their rights in the UK should look at applying for a registration document.

The tier 2 Visa, an Australian-style points system is already applied to immigrants coming from outside the European Economic Area and a similar system could find application also for those coming from the EU Countries. The points system takes into consideration among other factors, salary and English-language fluency.

After five years of continuous residency, visa holders can also apply for the permanent right to stay in the Country. The requirement of continuity is not that easy to prove, though.

British nationals living in Europe

For the 1.3 million British citizens that live or usually reside in the other European countries, the vote of the referendum will bring to a period of uncertainties.

Even if the fear that British expats would be forced to leave Europe overnight has been proven groundless, some new form of freedom of movement must be settled with the EU in short time.

Some lawyers have argued that British would have “acquired rights” granted by the application of the 1969 Vienna convention on the law of treaties.

- The UN convention establishes the rules to be respected with regard of international treaties, and, at article 70, states that, unless otherwise convened, if a treaty is ended or changed this would not affect any right or obligation of the parties arising from the treaty before it ended.
- This criterion is important since there is no “survival” clause with such effects in the Fundamental Treaties of the UE
- Still, the Convention concerns rights of one state to another, and it would be difficult for a private to invoke its effects before a court

In conclusion the Vienna Convention does not seem a viable solution for the right of residence, that will completely depend from the upcoming negotiations.

Even if applicable, the acquired rights might not extend much beyond residency and property rights, and would exclude rights to benefits, pensions and healthcare.



The eventual (and improbable) lack of bilateral agreements could lead to the extreme that a British citizen possessing a real estate in Spain would not be able to enjoy it more than 90 days a year, due to the lack of a residence permit.

New arrivals might also soon face stricter residency requirements, particularly if Britain will impose the same to EU nationals, and it is possible that people currently being expats would face new administrative burdens, including residency permits, work permits, and higher property taxes.

Britons could also lose the right to work within the EU area and be asked to apply for Blue Cards.

If Britons working in Europe that receive their salary in Euros won't be touched those who are currently subject to the sudden fall of the English Pound should instead worry, since the volatility effects of the Brexit are already visible.

Of course, if the Pound stays weak many expats may use the opportunity to re-enter the British property market.

In short, expats rights won't be guaranteed anymore by the comfortable umbrella of the EU's freedom of movement principle and the incoming negotiations will totally redefine their position.

Spanish Situation

Interim Prime Minister Rajoy granted that for at least two years from the notice nothing would change for UK expats in Spain.

Employment rules, freedom of movement, pensions and electoral rights would not be questioned until the expiration of this period.

Given so many UK citizens currently live in Spain and so many Spaniards live in the UK, there are good probabilities for a deal maintaining the status quo.

Spanish authorities estimate that almost half of UK expats are older than 50.

According to a study those expats that chose Spain are satisfied with the access to specialized doctors, quality of the medical personnel and public health infrastructures.

United Kingdom pays a monthly sum to Spain (for every pensioner) to compensate the costs represented by their presents in the territory. However, only the ones that applied for a registration with the local authorities are counted and the majority never applies.