

6 Areas Of UK Law Most Affected By Brexit

By **Alex Davis**

Law360, London (June 24, 2016, 11:42 AM ET) -- The vote to leave the European Union could radically change the U.K.'s legal and regulatory ties to the rest of Europe. Among the most affected will be practices focusing on finance, intellectual property, competition, data protection, immigration and international trade.

The U.K. must invoke Article 50 of the Treaty of Lisbon in order to commence breaking away from the EU. The article that provides breakaway states a two-year period to agree on exit terms, which would include replacement trade agreements with the EU. Any extension to this timeframe would need unanimous agreement from the remaining 27 countries.

Here is a run-through of some of the most significant impacts the firms are expecting Brexit — the colloquial term for Britain's exit from the EU — to have on finance, intellectual property, competition, data protection, immigration and international trade practices.

Financial Services

The U.K.'s Financial Conduct Authority reminded companies on Friday that they must continue to abide by their current obligations under U.K. law, including those derived from EU law, and continue with implementation plans for legislation that will take effect in the near future.

Both U.K. and EU legislation covering consumers' rights and protections are unaffected by the result of the referendum and will remain unchanged unless and until the government changes the applicable legislation, the FCA said.

But in the longer term, the impact will be seismic. Apart from the uncertainty now surrounding the EU's Capital Markets Union project, which was to be completed by 2019, question marks hang over the future of regulation such as the Markets in Financial Instruments Directive II package and application to U.K.-based firms.

Lawyers at Dechert LLP pointed out in a statement Friday that while the U.K. government could change some requirements, subject to whatever the final exit arrangement is, and any assessments of U.K./EU legal equivalence, firms in the U.K. could also lose crucial beneficial features such as passporting rights which allow them to sell products and services in any EU member country.

Immigration

There are around three million EU citizens living in the U.K. and 1.2 million British-born people living elsewhere in the EU, according to recent United Nations data. While the British expats face the prospect of losing their right to free movement throughout the EU, the EU citizens also face an uncertain future regarding their right to work in the U.K.

Gavin Jones, head of immigration at Osborne Clarke LLP, pointed out in a statement Friday that only a quarter of EU nationals living in Britain are in skilled work that would meet non-EU work permit skill-level requirements.

“Whilst it is highly unlikely there will be any retrospective changes to work permit rules, we expect significant discussions between government and industry representatives to ensure that vacancies can be filled,” Jones said.

Data Protection

The EU recently overhauled its data protection legislation with the General Data Protection Regulation, which came into force in May. The GDPR will fully apply to all member states by May 2018.

Lawyers at Clifford Chance LLP pointed out in their online Brexit guide that the U.K. leaving the EU will allow the government to amend its legal framework to create a ‘relatively light-touch regime’ for data protection. They argue that the U.K. would probably not try and reproduce the new, more burdensome requirements of the GDPR.

However, on the downside, Clifford Chance said that by doing that, there is no guarantee the U.K. would be regarded as a safe enough destination for personal data transferred from the EU, while U.K. businesses using service providers based in the EU would need to take account of both British and EU data protection laws.

Intellectual Property

In the wake of Brexit, the big loss for the U.K.’s intellectual property legal industry will be access to the EU’s Unified Patent Court system and the Unitary Patent, according to Nicola Dagg, London-based litigation partner and global head of the intellectual property group at Allen & Overy LLP.

London was earmarked as one of the destinations for courts that would make up the UPC, which is scheduled to start in 2017. The system, developed over several years, was designed to be a ‘one-stop shop’ for ruling on patents for the 25 member states which had signed up. Spain and Poland are the only countries currently not involved.

“The Unified Patent Court is a creature of EU law,” said Dagg. “My personal view is that the UPC will continue without the U.K.; future unitary patents won’t cover the U.K. and UPC judgments won’t extend to U.K. patents.”

The U.K. will still be able to participate in the the European Patent Convention, which is not part of EU law, Dagg said, and companies can still apply use the system for the application and grant of European patents at the European Patent Office.

However, over the longer term, the fact the U.K. won’t be involved in the UPC may weaken the

attraction of the U.K. courts as the place to go to resolve major patent disputes, Dagg said.

International Trade

Lawyers at Hogan Lovells pointed out in their Brexit Legal Implications report in April that the U.K. will stop benefiting from the free trade agreements put in place by the EU for more than 50 markets and will have to put in place bilateral agreements itself with each of those markets.

Many analysts have written about the various alternative trade models to EU membership the U.K. will have to consider. One example would be the European Economic Area agreement following in the footsteps of countries like Norway. While this would give the U.K. access to the EU's Single Market, it would still involve free movement of people. Additionally, the U.K. would have no say on the formation of EU legislation the country would still have to obey in order to take part in the Single Market.

One area of uncertainty that Brexit uncovers would be territory mentioned in cross-border contracts.

"The key question is whether a reference to the EU, for example as the territory which is covered by the contract, in a contract signed pre-Brexit will be deemed to include or exclude U.K. with respect to a period after Brexit," Hogan Lovells said in the report. "It is unlikely that there will be a blanket statutory "deeming" of the answer to this question covering all contracts."

In another example, a U.K. exit from the EU could potentially leave contracts for all European over-the-counter derivative trades written in English law open to dispute, the International Swaps and Derivatives Association pointed out in April.

Competition Law

The U.K. competition bar is fueled by Brussels and the country's antitrust rules in particular mirror EU law banning cartels and abuse of dominance. The country's prominent antitrust damages litigation scene is powered in large part by binding EU enforcement decisions sanctioning price fixers. And at their core, the rights English lawyers enjoy to practice before the EU courts and claim privilege at the commission stem from the U.K.'s membership in the EU.

U.K. legal groups worry Brexit could undercut the U.K.'s burgeoning competition damages litigation market. Under current law, commission decisions in cartel and abuse of dominance cases are binding on national courts. That means that though consumers or businesses who believe they paid too much for price-fixed goods have to show that they overpaid and by how much, they don't have to prove that cartelists sanctioned by the EU are liable.

The U.K. courts have heard cases over a number of big European cartels, ranging from air cargo price-fixing allegations to complaints about MasterCard Inc.'s merchant fees that the credit card giant has said could cost it conservatively \$270 million to settle.

But this work could drift to other courts in the EU, Becket McGrath, a partner at Cooley LLP, said recently.

"Given that the premise for that referendum outcome would presumably be, 'The British people don't like commission decisions being binding in the U.K.,' it's hard to see an outcome where a commission infringement decision would still bind a U.K. court," McGrath said. "That could shift the balance in favor

of other jurisdictions, which would have a particular impact on law firms that have specially focused on claimant work."

--Additional reporting by Melissa Lipman. Editing by Rebecca Flanagan.

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