



# Consumer Products

What are the legal issues for the Consumer Products sector following a Brexit?

Issue	Impact	Areas of law affected
<b>Migrant workforce</b>	<p>The migrant workforce make a significant contribution to the Consumer Products sector’s output, in particular in food &amp; drink manufacturing. It remains to be seen whether free movement of workers between the existing EU and EEA states will continue. Brexit could lead to new EU migrants facing the same border controls as those from non-EU countries. This would require consumer products firms to significantly change their recruitment models and the additional checks and processes could substantially impact on HR and legal costs and potentially cause a shortage of labour in the sector.</p>	 Employment
<b>Impact on M&amp;A</b>	<p>Although uncertainty is often a deterrent to M&amp;A activity, our view is that a combination of the rise of foreign investors, particularly from the Far East, into Consumer Products businesses, particularly food, should remain undiminished. Food businesses generally are less volatile to changes in GDP and hence we anticipate that M&amp;A activity should continue. Whilst the levels of debt from non-UK lenders to fund investments and capital expenditure may be more restricted, particularly where they are larger deals which rely on European debt syndication markets to allow transaction risk to be spread over a wider pool of syndicated lenders, we anticipate that the UK banks will be keen to lend to fund acquisitions and fixed capital expenditure projects where the business plan merits this.</p>	 Corporate
<b>Luxury sector - a benefit due to the fall in the value of the pound</b>	<p>The significant reduction in the value of the pound following the vote to Leave the EU will be beneficial for overseas purchasers in the luxury sector. Analysts have been suggesting that the low value of the pound will trigger increased operating profits and we are already seeing upgrade in the luxury sector, as evidenced by the recent upgrade of Burberry by Bank of America Merrill Lynch. The HSBC forecast predicts even lower levels of sterling which we anticipate may result in further opportunities for the luxury sector.</p>	 Consumer Products

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**Demand in the General Retail and Food Retail Sector**

We believe that a distinction is likely to be drawn between food retailing and non-food retailing.

In non-food retailing, reductions in GDP are likely to lead to demand reductions, particular in higher value items. When coupled with the potential shortage of labour, costs for UK retail could increase. One potential bright-spot is that sales of affordable 'treats' (e.g. lipstick, in-home 'restaurant dining') tend to fare well in downturns. Lower value retailers and retailers with larger overseas revenue and profit exposure are likely to be better placed.

The impact on the food retailing sector, being largely domestic, should fare better. The move to the discounters is likely to increase given the reduction in GDP. One key element will be with regard to cost inflation, both from suppliers who may have increased costs if subsidies are reduced, as well as dealing with a contracted workforce.



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**Impact of trade agreements particularly significant for certain categories e.g. Whiskey**

Certain categories will be more impacted by others as a result of any trade agreement. Beverages, especially Whiskey, are a particularly significant export for the UK. In contrast the UK is hugely reliant on imports of fruits, vegetables, meat, beverages, cereals and dairy.



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**Enforcement of competition law**

The leave vote has important ramifications for the enforcement of competition law in the UK. Whilst UK companies who trade in Europe will still be subject to EU competition law, the leave vote means that the European Commission will not be able to investigate companies' activities within the UK. The Competition and Markets Authority (CMA) will be responsible for the application of competition law in the UK and will therefore come under pressure to up its game in terms of enforcement, as well as being required to examine more mergers in the absence of the EU one-stop shop merger clearance process. As a result, we can expect to see significant restructuring of the CMA.



Competition

The consumer products sector has always been an important focus area for the CMA. We do not expect this to change, and we expect that the CMA would continue broadly to follow the approach of the European Commission in the application of competition law in this sector.

**Rules on packaging and claims**

Packaging is currently highly regulated by the EU. The regulations cover many aspects of packaging for example environmental credentials and claims that can be made on pack. Most of these regulations are incorporated into UK law so they will not change immediately. However, once the UK does leave the EU, the UK will have the freedom to repeal or amend the law. For any company which wishes to continue trading within the EU they will potentially have to comply with two packaging regimes, EU and UK.



Regulation

Issue	Impact	Areas of law affected
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**Product Safety**

The safety (generally the design, construction and labelling) of very many different product types is regulated via EU product safety legislation. Frequently this is via sector-specific CE marking EU directives or regulations or via more generally applicable safety legislation which may apply across a wide variety of different products (e.g. low voltage electrical products which may have a range of different functions). This EU legislation is usually transposed into UK law via UK primary or secondary legislation. This legislation, and the CE marking which goes with this, will not change immediately. However, if and when the UK elects to change its product safety laws, UK manufacturers or importers will have to alter their products and manufacturing operations to comply with the new UK rules. They will also have to continue to meet EU CE marking and other requirements in order to retain the right to sell their products across the EU member states.



**Patents**

In many respects, the European patent landscape remains unchanged. The European Patent Convention is not based upon EU membership, and as before patents will continue to be granted on a national basis in European territories, regardless of whether they are via national IPOs or the EPO.

However, the UK's departure from the EU is a real blow to the proposed Unitary Patent system, legislation for which the UK has yet to ratify. Membership of the Unitary Patent system is limited to EU member states as currently drafted.



**Trademarks**

For the time being, there is no change. Brand owners should consider national or EU trade mark filings based upon the same cost-benefit commercial considerations of markets and ambition.





The new Trade Mark Directive due to be transposed into UK law before 14 January 2019 may not necessarily be enacted.

Unless an equivalent regime is created, the protection offered by the geographic indicators (PDO, PGI etc) regime will be lost for UK producers. This may be a major issue for traditional foodstuffs in the UK food and drinks sector.

In the longer term, EU trade marks would ultimately cease to apply in the UK once it leaves the EU. The transition from EU to national trade marks will again be a matter of negotiation, but it would be logical to offer some form of conversion or similar to EU trade mark proprietors.

The UK EU trade mark Courts (the High Court and IPEC, Court of Session in Scotland and High Court of Northern Ireland etc) will ultimately have no jurisdiction to hear EU trade mark disputes or to grant cross border relief in respect of their infringement.



Issue	Impact	Areas of law affected
<b>Copyright</b>	<p>Copyright law is far less harmonised than other areas and is effectively treated as national domestic law in most respects. Some harmonisation may be required for access to EU markets (for example, the Commission's drive for an EU digital market), but that is unlikely to require much in the short term.</p>	 Intellectual Property
<b>Design rights</b>	<p>UK design rights will obviously continue uninterrupted and there is no immediate change as regards EU design rights. Once the UK leaves the EU, then ultimately EU registered and unregistered designs under the Community Designs Regulation will no longer protect designs in the UK.</p> <p>Unless replaced with a domestic equivalent, the loss of EU unregistered design protection will be of particular concern to certain industries, such as the fashion industry, as the protection under the EU regime was wider than the equivalent UK protection.</p> <p>As with EU TMs, the UK EU Community Design Courts will no longer have jurisdiction to hear EU design cases.</p>	 Intellectual Property
<b>Trade secrets</b>	<p>The decision to leave the EU will have little or no impact on the law in relation to trade secrets. The new Trade Secrets Directive will still come into force in July 2016. This will be binding on the UK until it leaves the EU. In any event, most of the provisions are already part of UK law so there will be little impact even in the long term.</p>	 Intellectual Property
<b>IP Contracts</b>	<p>Companies should be considering the impact of the UK leaving the EU in the drafting of all future licences or assignments and should also review licences or assignments that have already been entered into for any unexpected consequences. Licences or assignments which were drafted before a referendum on EU membership was even contemplated could be particularly at risk of unintended and unexpected consequences of their drafting. For example:</p> <ul style="list-style-type: none"> <li>— If the territorial scope of the agreement is defined as the 'EU' the UK may fall outside of this once the UK has left the EU, and</li> <li>— Leaving the EU could constitute a force majeure event or trigger termination provisions.</li> </ul> <p>In the longer term, it may be that exclusive jurisdiction clauses in licence or assignment agreements in favour of the English Courts will no longer prevent an EU Court from hearing a claim as the Brussels Regulation on choice of law will not apply to the UK. Unfortunately this could lead to more complex, international litigation unless the UK chooses to enter into an agreement similar to the Brussels Regulation with the EU.</p>	 Intellectual Property

**Sustainability & environmental performance standard in buildings**

The UK's exit from the EU may lead to a divergence in approach between the EU and the UK in relation to sustainability and environmental performance standards in buildings and other facilities. There could be an attempt to dilute EU standards with a view to lowering compliance costs. This needs to be balanced against the reputational risks for international organisations which seek to promote generally high standards of sustainability.



Real Estate

**Environment**

Existing EU originating environment laws will apply in the UK at least until the withdrawal. Post withdrawal the extent to which they will apply will depend on the terms of any new agreement with the EU and the approach adopted by the UK Government and Parliament. However, for consumer products manufacturers which continue to place goods on the EU market, they will have to continue to comply with existing and new EU law whether the UK is in the EU or otherwise.



Environment

**What action can you take now?**

**How can CMS help?**

<p><b>Brexit planning – internal briefing.</b> Ensure necessary briefing internally on Brexit and raise awareness of the above issues/impacts – at both board level and in the business generally.</p>	<p>Provide in-house Brexit training/presentation. Lead in-house Brexit brain-storming. Review in-house briefings.</p>
<p><b>Brexit planning – public affairs/governmental relations</b> Prepare list of areas/issues for lobbying post vote to leave.</p>	<p>Brainstorm/review issues.</p>
<p><b>Contract audit</b> – companies should review all contracts which reference EU legislation and/or which pre-suppose that the UK will remain an EU member state to assess the impact of Brexit on these contracts and the parties' contractual arrangements for regulatory compliance.</p>	<p>CMS is able to advise on the drafting and negotiation of clauses that can best protect your business in light of a Brexit.</p>
<p><b>Drafting</b> – companies should be considering the impact of the UK leaving the EU in the drafting of all future licences or assignments and should also review licences or assignments that have already been entered into for any unexpected consequences.</p>	<p>CMS can advise on the review and drafting of licences and assignments in light of Brexit</p>

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