



# Impact of Brexit on Key Property Legislation<sup>1</sup>

**THIS TABLE IDENTIFIES THE EU or UK SOURCE OF REGULATION AND LEGISLATION IMPACTING THE UK PROPERTY MARKET TO INFORM AS TO THE POTENTIAL IMPACT OF BREXIT.**

**Note:** EU directives, in contrast to EU regulations, are not directly applicable (that is, they do not become part of national law until implemented). As such, member states must enact national legislation that achieves the result required by the directive. This is typically done through statutory instruments adopted on the basis of the European Communities Act (ECA) 1972. If the ECA 1972 is repealed, these statutory instruments will fall away unless they are expressly 'saved' by the repealing legislation.

## Contracts

Legislation	Main provisions and effect	Source: UK or EU?	Likely subject of replacement or repeal?
<b>Misrepresentation Act 1967</b>	Introduced an additional (tortious) remedy for contracting parties induced to enter contracts based on untrue statements.	UK	No
<b>Unfair Contract Terms Act 1977</b>	This imposes limits on the extent to which liability for breach of contract, negligence or other breaches of duty can be avoided by means of contractual provisions such as exclusion clauses.	UK	No
<b>OJEU notices in Public Contracts Regulations 2006 and Public Contracts Regulations 2015 (together, the PCC Regulations)</b>	Certain types of works contracts (in particular public procurement contracts) need to be advertised in the Official Journal of the European Union (OJEU) by way of a contract notice. This invites expressions of interest. These will be evaluated and further information will be sent to selected parties. The purpose of the EU procurement rules and the implementing UK legislation is intended to ensure that contracts are awarded fairly, transparently and without discrimination on the grounds of nationality and that all potential bidders are treated equally.	UK and EU. The 2006 and 2015 Regulations implement the Public Sector Procurement Directive 2004 and Public Contracts Directive 2014.	The UK may choose to remove 'red tape' by repealing those aspects of the PCC Regulation that require UK entities to follow the OJEU notice process. However, it is unlikely that the PCC Regulations will be repealed in their entirety as they deal with transparency, fairness and procedures for public procurements in the UK more generally.

<sup>1</sup> 'UK' legislation may not necessarily apply throughout the whole of the UK.

# Environmental

<b>Legislation</b> <b>Environmental Protection Act (EPA) 1990</b>	<b>Main provisions and effect</b> Part IIA of the EPA governs the contaminated land regime and sets out the obligations on tenants, land owners and other responsible parties for contamination found on their land, the focus being on remediation of that contamination.	<b>Source: UK or EU?</b> UK	<b>Likely subject of replacement or repeal?</b> No
<b>Legislation</b> <b>Environmental Impact Assessment (EIA) in Town and Country Planning (Environmental Impact Assessment) Regulations 2011 (the EIA Regulations)</b>	<b>Main provisions and effect</b> The EIA process obliges developers to provide full information of any significant environmental effects to the relevant planning authorities before consent for larger developments is granted.	<b>Source: UK or EU?</b> UK and EU. The EIA Regulations implement matters required by the EIA Directive 2011 but were made under domestic law (the Town and Country Planning Act 1990). The EIA Directive 2014 amends the EIA Directive 2011 to streamline the regime. Member states are required to implement the EIA Directive 2014 by 16 May 2017.	<b>Likely subject of replacement or repeal?</b> It is unlikely that the UK will be obliged to implement the EIA Directive 2014 (assuming the formal 'exit' process commences). It will be up to Parliament to decide whether to amend or repeal the current EIA Regulations, subject to any overarching international treaty obligations and / or any provisions or processes that may form part of the UK's new trading arrangements with the EU.
<b>Legislation</b> <b>MEES in:</b> <ul style="list-style-type: none"><li>• <b>Energy Act 2011 (the EA); and</b></li><li>• <b>Energy Efficiency (Private Rented Property) (England and Wales) Regulations 2015 (the MEES Regulations)</b></li></ul>	<b>Main provisions and effect</b> The EA required the government to introduce measures, including MEES, to improve the energy efficiency of domestic and non-domestic private rented (PRS) buildings in England and Wales and so cut carbon emissions. The MEES Regulations: <ol style="list-style-type: none"><li>enable the tenant of a domestic privately rented property to request the landlord's consent (which cannot then be unreasonably withheld) to the tenant making energy efficiency improvements to the property despite restrictions on making improvements in the lease; and</li><li>require a landlord to ensure that their domestic and/or non-domestic PRS property meets MEES (subject to certain exemptions), failing which a landlord will not be permitted to grant a new tenancy, to extend or renew an existing tenancy, or allow an on-going tenancy to continue after certain specified dates in 2018 and 2023.</li></ol>	<b>Source: UK or EU?</b> UK and EU. The EA implements obligations imposed on EU member states by the EU Energy Performance of Buildings Directive 2010 (the EPB Directive).	<b>Likely subject of replacement or repeal?</b> The EA and MEES Regulations could be subject to review, although a complete repeal is unlikely given the UK's statutory and international treaty commitments to reduce carbon emissions. The measurement of energy efficiency intrinsic to MEES relies on the EPC regime, which (as noted below) also flows from the EPB Directive. As such, changes to the EPC regime would have a knock-on effect on MEES. This relationship demonstrates, simply, the interconnected nature of environmental legislation in the UK, and highlights the difficulties that will be faced by the legislature when considering any repeal or replacement of the various regimes.
<b>Legislation</b> <b>Energy Performance of Buildings (England and Wales) Regulations 2012 (the EPC Regulations)</b>	<b>Main provisions and effect</b> Introduces the following requirements on any sale (which includes an assignment) or letting: <ul style="list-style-type: none"><li>• commission an energy performance certificate (EPC) before marketing if there is no existing valid EPC;</li><li>• put the EPC rating in any advertisements of the property for sale or for rent; and</li><li>• make available to the prospective buyer or tenant a valid EPC for the property.</li></ul>	<b>Source: UK or EU?</b> UK and EU. EU regulations in 2002 required the introduction of EPCs and were further extended by the EPB Directive. The EPC Regulations implements the requirements of the EPB Directive (in places, transcribing the EPB Directive verbatim).	<b>Likely subject of replacement or repeal?</b> The EPC Regulations could be subject to review, although a complete repeal is unlikely given the UK's statutory and international treaty commitments to reduce carbon emissions. Please see comment above in relation to MEES.

# Financial services

## Legislation

**Financial Services and Markets Act 2000 (Markets in Financial Instruments) Regulations 2007 (as amended), along with amendments to the Financial Services and Markets Act 2000 and its Secondary legislation implementing the Markets in Financial Instruments Directive (MiFID) (together, the MiFID implementing legislation) and (parts of) the FCA Handbook.**

## Main provisions and effect

MiFID provides a pan-EU framework for the provision of investment services and activities and a single market passport allowing investment firms authorised in their home member state to offer investment services and activities across the EEA on the basis of their home state authorisation. Managers engaged solely in collective portfolio management are outside MiFID scope, however managers of UCITS/AIFs which provide discretionary management, advice or administration and custody services to non-fund clients are subject to most of MiFID's operational requirements.

## Source: UK or EU?

UK and EU. MiFID was implemented in the UK via the MiFID implementing legislation and provisions in the FCA Handbook

## Likely subject of replacement or repeal?

MiFID is likely to be repealed and recast prior to Brexit by the MiFID II Directive and a directly applicable regulation, MiFIR (together, MiFID II). MiFID II transposition is scheduled for 3 January 2018. Those managers affected by the likely loss of the MiFID passport may be able to continue to operate cross-border or via a branch under the MiFID II third country regime, although this involves: (a) branch establishment for retail clients; and (b) a registration process (contingent on an equivalence assessment) for provisions of services cross border.

## Legislation

**European Markets Infrastructure Regulations 2012 (EMIR)**

## Main provisions and effect

The regulation affects all entities (that are not individuals) who trade in derivatives contracts within the EU. It requires that all users of derivatives have documentation in place governing their classification (FC, NFC+ and NFC-), portfolio reconciliation and compression, dispute resolution and trade reporting. All users, other than non-financial counterparties below the clearing threshold ('NFC-') are required by the regulation for their trades to submit their trades for central clearing.

The requirements for trade reporting are that both entities (regardless of their classification) are responsible for reporting and monitoring details of their trading activity via a registered trade repository, such as DTCC. Whilst a non-financial user of derivatives can delegate the physical act of reporting the trade to their financial counterparty, they remain legally liable for the data reported on their behalf and must therefore periodically review the data held at the trade repository; a process that is too complex for many smaller corporate entities.

## Source: UK or EU?

EU

## Likely subject of replacement or repeal?

No – EMIR is the product of a G20 commitment (2009) which the UK agreed to and it is unlikely to be repealed post-Brexit. A recent review of EMIR concluded that financial entities should be required to report trades on behalf of non-financial entities, and proposals to amend the regulations have been made to the European Council to this effect. If adopted these proposals would bring European requirements in line with those in the US and reduce the regulatory burden on smaller, less sophisticated investors in real estate.

## Legislation

**Alternative Investment Fund Managers Directive 2011/61/EU of 8 June 2011 (AIFMD) and the Commission Delegated Regulation (EU) No 231/2013 of 19 December 2012 supplementing Directive 2011/61/EU**

## Main provisions and effect

AIFMD regulates the activities of fund managers (alternative investment fund managers (AIFM)). AIFMD does not seek to regulate the activities of the funds that AIFMs manage (alternative investment funds (AIFs)), although it does oblige AIFMs to ensure that relevant AIFs have depositaries in place and to comply with reporting and disclosure requirements.

AIFMD requires AIFMs to be authorised and supervised by the regulator in their home member state; maintain capital reserves of at least €125,000; have appropriate governance and conduct of business standards and introduce procedures for independent valuation of AIF assets. It also introduces requirements on marketing AIFs: these vary depending on whether the AIFM is in the EEA or outside the EEA and what type of AIF (EEA or non-EEA) is to be offered. Currently, a marketing passport is available for EEA AIFMs marketing EEA AIFs. AIFMD provides for this passport to be extended to include 'third country' AIFMs and AIFs. This extension process has been initiated by ESMA, but has not yet been implemented in respect of any third country.

The main aim of AIFMD is to enhance the transparency to investors, stakeholders and supervisors, of AIFMs and the funds they manage. For instance, by requiring disclosure to investors prior to investment, reporting obligations to competent regulatory authorities, disclosures in AIF annual reports and AIFM disclosures about investment in investee companies.

## Source: UK or EU?

UK and EU. The Alternative Fund Managers Directive (AIFMD) is implemented in the UK via AIFMR and provisions in the FCA Handbook.

## Likely subject of replacement or repeal?

The AIFMR may be subject to amendment or repeal. On the UK's withdrawal from the EU, the UK is very likely to become a third country and UK AIFMs 'third country firms' (i.e. non-EEA AIFMs) who will be subject to the third country passport extension assessment, minimum compliance conditions (including the requirement for a co-operation agreement with ESMA) along with a general scrutiny of the UK's regulatory framework. Despite the UK already having a fully-equivalent regime and offering equal market access, the decision on actual implementation of the third country 'passporting' rests with the European Commission, and may be clouded by political issues at play. Pending access to the third country passport, UK AIFMs, as non-EEA AIFMs, will therefore have to market using national private placement regimes. This could cut off (or make it harder to access) sources of capital in the member states less open to marketing by non-EEA AIFMs.

**In the UK, the Alternative Investment Fund Managers Regulations 2013 (AIFMR) and (parts of) FCA Handbook**

<b>Legislation</b> <b>UK European Long-term Investment Fund Regulations 2015</b>	<b>Main provisions and effect</b> <p>A new type of regulated fund to facilitate retail and institutional investment in projects that require long-term capital (for instance, infrastructure, real estate, transport and energy). The intention, as originally set out in the European Commission's 2013 proposal, is to create a single market in the EU for long-term investment funds, in order to help facilitate the financing of its real economy.</p> <p>ELTIFs can only be offered by an AIFM, who is authorised under the AIFMR. ELTIFs currently benefit from the marketing passport under the AIFMD.</p>	<b>Source: UK or EU?</b> <p>UK and EU. The 2015 UK ELTIF Regulations make minor changes to UK primary and secondary legislation to give effect to the EU ELTIF regulation.</p>	<b>Likely subject of replacement or repeal?</b> <p>See above under AIFMR.</p>
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## Land & Planning

<b>Legislation</b> <b>Law of Property Act 1925</b>	<b>Main provisions and effect</b> <p>This created the current system of two legal estates in land: freehold and leasehold. It also introduced land registration.</p>	<b>Source: UK or EU?</b> <p>UK</p>	<b>Likely subject of replacement or repeal?</b> <p>No – but proposals for reform might suffer from lack of government/parliamentary time due to Brexit negotiations.</p>
<b>Legislation</b> <b>Land Charges Act 1972</b>	<b>Main provisions and effect</b> <p>This updated the system for registering land charges on unregistered land.</p>	<b>Source: UK or EU?</b> <p>UK</p>	<b>Likely subject of replacement or repeal?</b> <p>No</p>
<b>Legislation</b> <b>The Law of Property (Miscellaneous Provisions) Act 1989</b>	<b>Main provisions and effect</b> <p>This sets out the formalities for land contracts.</p>	<b>Source: UK or EU?</b> <p>UK</p>	<b>Likely subject of replacement or repeal?</b> <p>No</p>
<b>Legislation</b> <b>Land Registration Act 2002</b>	<b>Main provisions and effect</b> <p>This modernised land registration law (replacing the Land Registration Act 1925) with the aim of achieving complete registration of the whole of England and Wales.</p>	<b>Source: UK or EU?</b> <p>UK</p>	<b>Likely subject of replacement or repeal?</b> <p>No – but proposals for reform might suffer from lack of government/parliamentary time due to Brexit negotiations.</p>
<b>Legislation</b> <b>Planning and Compulsory Purchase Act 2004</b>	<b>Main provisions and effect</b> <p>Updates the law on development, planning and compulsory acquisition of land by public bodies when the landowner is not willing to sell by agreement.</p>	<b>Source: UK or EU?</b> <p>UK</p>	<b>Likely subject of replacement or repeal?</b> <p>No</p>

# Landlord & Tenant

<b>Legislation</b> <b>The Landlord and Tenant Act 1954</b>	<b>Main provisions and effect</b> This introduced security of tenure for business tenancies and a statutory procedure for dealing with renewals and opposition to such renewals. It also sets out circumstances on which a tenant will be entitled to compensation where its tenancy is not renewed.	<b>Source: UK or EU?</b> UK	<b>Likely subject of replacement or repeal?</b> No
<b>Legislation</b> <b>Landlord and Tenant Act 1988</b>	<b>Main provisions and effect</b> Imposes (in respect of most leases of commercial property) a duty on landlords not unreasonably to withhold consent to the tenant assigning or underletting.	<b>Source: UK or EU?</b> UK	<b>Likely subject of replacement or repeal?</b> No
<b>Legislation</b> <b>Landlord and Tenant (Covenants) Act 1995</b>	<b>Main provisions and effect</b> Releases tenants of 'new' tenancies (that is, most tenancies granted from 1996 onwards) from their obligations under a lease upon a lawful assignment. Also Allows the landlord and tenant to agree that the landlord may require the outgoing tenant to enter into an authorised guarantee arrangement (AGA) guaranteeing performance of the incoming tenant's obligations (until the next lawful assignment of the lease) as a condition of obtaining the landlord's consent to the assignment.	<b>Source: UK or EU?</b> UK	<b>Likely subject of replacement or repeal?</b> Possibly, but this would be due to considerable criticism surrounding the 'AGA saga' rather than as a result of Brexit.

# Tax

<b>Legislation</b> <b>Value Added Tax Act 1994</b>	<b>Main provisions and effect</b> Supplies of interests in, rights over, or licences to occupy commercial land or buildings are generally exempt supplies, unless the supplier has opted to tax. For this purpose, the relevant supply could be a grant, assignment, surrender or reverse surrender of a lease.	<b>Source: UK or EU?</b> The UK's VAT system is underpinned by EU law – multiple VAT directives have been implemented in the UK through domestic UK legislation.	<b>Likely subject of replacement or repeal?</b> The implementing UK legislation will not automatically fall away. It is unlikely that the UK government will chose to repeal (in its entirety) a supply tax such as VAT without replacing it with something similar. For now, lawyers should check when drafting their property contracts that any definition of VAT is a UK (rather than EU) law based definition.
<b>Legislation</b> <b>The Finance Act 2003</b>	<b>Main provisions and effect</b> This introduced stamp duty land tax (SDLT) to replace the old system of stamp duty, as it applied to land transactions.	<b>Source: UK or EU?</b> UK	<b>Likely subject of replacement or repeal?</b> No

# Other

## Legislation

### Competition Act 1998 (the 1998 Act) and Article 101 of the Treaty of the Functioning of the European Union (TFEU)

The 1998 Act was amended by the Enterprise and Regulatory Reform Act 2013

## Main provisions and effect

Article 101 of the TFEU prohibits agreements that have as their object or effect the restriction, prevention or distortion of competition within the EU and which have an effect on trade between EU member states. The 1998 Act mirrors this prohibition in respect of competition (and the effect on trade) within the UK.

Currently, exclusivity granted to one tenant (for example a shopping centre owner granting exclusivity to one particular coffee shop at the centre when it could support further coffee shops) may be illegal under the current regime. Care also has to be given to the drafting of restrictive covenants relating to the future use of land on a disposal, as these may also fall foul of the regime.

## Source: UK or EU?

UK & EU

## Likely subject of replacement or repeal?

The prohibition contained in Article 101 of the TFEU will fall away upon the UK seceding from the Treaty; however, it is likely that any settlement allowing the UK access to the single market following Brexit will be conditional on the UK continuing to enforce the prohibition.

Any proposed change to the UK specific regime will need to be implemented through repealing or changing the 1998 Act.

## Legislation

### Immigration Act 2014

## Main provisions and effect

This prohibits private landlords of residential properties from allowing certain people (based on immigration status) from occupying those properties. Landlords and agents must check the status of prospective tenants and other authorised occupiers to ascertain whether those parties have the right to be in the UK.

## Source: UK or EU?

UK

## Likely subject of replacement or repeal?

The UK may decide to amend to provisions of the Act (to remove the unlimited right of EEA nationals and the time-limited rights afforded by certain EU rights), subject to the outcome of any negotiated settlement with the EU (in terms of trade, services, and labour etc.).

## Legislation

### Transfer of Undertakings (Protection of Employment) Regulations 2006 (TUPE)

## Main provisions and effect

This provides that on a transfer of a business or undertaking or a service provision change:

- Employees of the 'transferor' automatically transfer to the 'transferee'.
- The transferee steps into the shoes of the transferor and inherits employment-related liabilities.
- The transferor and transferee have obligations to inform and consult representatives of their employees.
- Employees have special protection against dismissal and changes to their terms of employment.

As employers and employees may be landlords, tenants or facilities service providers, TUPE requires careful consideration in property transactions, particularly when property is transferring as part of a transfer of a business.

## Source: UK or EU?

UK and EU. TUPE implements the Acquired Rights Directive 2001. English courts and employment tribunals are required to give TUPE a purposive construction to give effect to the general purpose of the underlying Directive, which is to safeguard employees' rights on the transfer of a business.

## Likely subject of replacement or repeal?

Aspects of TUPE can cause headaches for employers, particularly among non-EU based businesses that are less accustomed to TUPE.

Although Parliament could technically repeal TUPE, this is unlikely as it may not be politically expedient to repeal legislation that is designed to protect employees, especially on the transfer of a going concern. At best, the UK government may seek to remove some of what are regarded as the more 'uncommercial' aspects, such as the application of TUPE on a service provision change.

# Acknowledgements

This table was compiled by the IPF's Regulation and Legislation Group, which was established in 2011 to enable the IPF to be proactive in identifying any proposed relevant legislative and regulatory changes, both domestic and international, that may have an impact on the UK property market. The Group will then decide what actions are appropriate – these may include responding to the proposals (in a solo capacity or in conjunction with other organisations); research and/or providing details of the changes to members and the wider industry through briefing papers, workshops, seminars etc.

A copy of the table can be downloaded from the IPF website: [www.ipf.org.uk](http://www.ipf.org.uk)

The IPF would like to thank the members of the Group (listed below) for their time and expertise in putting the table together:

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