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## **The Brave New World of Brexit: A guide to the legal implications for your business**

In the referendum on 23 June 2016, UK voters decided to leave the European Union (EU). This note sets out a brief overview of the current legal position following the referendum, the alternative options open to the UK, and the way in which businesses may be impacted by Brexit.

### **What is the current legal position?**

Article 50 of the Treaty on the European Union (TEU) contains the procedure for the withdrawal of a Member State. The UK must invoke the withdrawal procedure by formally notifying the European Council of its intention to leave the EU. This has become known as the 'Article 50 notice.' There is no time limit within which the UK must notify the EU under Article 50. However, the EU has stated in recent weeks that no negotiations, whether informal or formal, will take place until it has received the Article 50 notice from the UK Government.

Following the notification of the EU pursuant to Article 50, the EU and the UK will negotiate the arrangements for the UK's withdrawal from the EU and the future relationship of the UK with the EU. The agreement will require the qualified majority consent of the European Council and the consent of the UK and European Parliaments. The EU Treaties will no longer apply to the UK from the date of entry into force of the withdrawal agreement, or, if no agreement is reached, within two years from the Article 50 notice. The two years can be extended, but only with the unanimous consent of the European Council. It is widely expected that the negotiations with the EU will take longer than two years, especially as this is the first time that a Member State has left the EU.

The UK Parliament will also have to repeal the European Communities Act 1972, which gave EU law supremacy over UK law. It is unclear whether this will happen before the Article 50 notice has been given, or at the conclusion of the negotiations with the EU.

### **What is the UK's position during the trade negotiations with the EU?**

During the negotiations with the EU, the UK will remain a full member of the EU, and EU laws will continue to apply in the UK.

In addition, many EU laws are implemented into, and are part of, UK law and will, therefore, continue to apply once the UK exits from the EU. The UK Parliament will then have to decide which of these laws it would like to repeal, which it would like to retain and which it would like to amend. It is expected that this process will take years, if not decades, to complete, as the EU has adopted more than 100,000 pieces of legislation.

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

At this stage, nobody knows what the future relationship with the EU will look like, as this is the first time that a Member State has left the EU. We have considered the relationships which the EU has with other non-EU countries and summarise these below:

### **Member of the European Economic Area (EEA) – the ‘Norwegian’ model**

The EEA includes the EU Member States, as well as Norway, Iceland and Liechtenstein. Membership of the EEA ensures access to the single market. In return, all members must adhere to the four freedoms i.e. the free movement of goods, services, persons and capital, in the same way as members of the EU. In addition, many pieces of EU legislation apply to EEA members. Norway has estimated that it is required to implement around 75% of EU law. The downside is that the UK would no longer have the opportunity to exert any direct influence over that legislation. Membership of the EEA also requires financial contributions towards the operational and administrative costs of the EU.

As membership of the EEA requires adherence to the free movement of persons, we consider it unlikely that this model will be the UK Government’s preferred option for political reasons.

### **Member of the European Free Trade Association (EFTA) – the ‘Swiss’ model**

Switzerland is a member of EFTA, together with Norway, Iceland and Liechtenstein. In return for access to the EU’s single market, Switzerland has to comply with the free movement of persons and various other provisions of EU law. However, as Switzerland is not a member of the EEA (unlike the other EFTA countries), it has negotiated over 100 bilateral treaties with the EU. In February 2014, the Swiss people voted in a referendum to introduce quotas for all migrants in Switzerland. Such a quota system would, if implemented, violate the agreement between Switzerland and the EU on the free movement of persons. At this stage, it is not clear what this means for the future relationship between the EU and Switzerland.

As this model also requires adherence to the free movement of persons, we consider it unlikely that it will be the UK Government’s preferred option. In addition, the EU may be reluctant to replicate the complex relationship between Switzerland and the EU with the UK.

### **A customs union - the ‘Turkish’ model**

The UK could negotiate a customs union with the EU, similar to the relationship which Turkey has with the EU. The customs union agreement between the EU and Turkey came into force on 31<sup>st</sup> December 1995. The customs union provides a common external tariff for all industrial goods, but does not address agriculture (except processed agricultural products), services or public procurement. Bilateral trade concessions apply to agricultural products.

The advantages of a customs union, similar to the one with Turkey, are that it would provide access to the EU’s single market for trade in goods whilst, at the same time, giving the UK a greater level of autonomy from EU law. The UK would also no longer be obliged to contribute to the EU budget, or participate in common policies such as the Common Agricultural Policy and regional/structural funding. However, the downside is that the UK would no longer have access to the single market for services, notably in respect of financial services. Given the importance of London as a financial services centre, this is unlikely to be an attractive proposition for the UK Government. In addition, the UK would be required to implement EU law in relation to goods which it wishes to export to the EU, but would lose the right to exert influence on developing EU regulations in this area.

### **A free trade agreement - the ‘Canadian’ model**

The UK may wish to negotiate a free trade agreement with the EU similar to the Comprehensive Economic and Trade Agreement (CETA) negotiated between the EU and Canada. The negotiations for CETA took over five years and completed on 26 September 2014. CETA still awaits ratification by the European Council and the European Parliament.

CETA will remove over 99% of tariffs between the EU and Canada and is expected to create new market access opportunities in services and investment. In summary, CETA provides that:

- most industrial, agricultural and fisheries duties will be eliminated;
- the EU and Canada will foster closer contacts in the field of technical regulations;
- Canada will recognise a list of EU car standards, from which EU car exports to Canada will benefit;
- EU companies will have better access to key Canadian sectors such as financial services, telecommunications, energy and maritime transport.

This model would give the UK the freedom to regulate much of UK life, subject to any free trade agreements' provisions regarding goods and services (e.g. UK goods imported to the EU would have to comply with relevant EU standards). It is expected that any such free trade agreement would require a complete legislative overhaul alongside the negotiation of the new trade agreements. The downside is that UK goods and services exported to the EU would still have to comply with relevant EU standards, while the UK would no longer have any direct role in setting those standards.

### **World Trade Organisation**

The World Trade Organisation (**WTO**) was established in 1995 and has 162 member countries, including the UK, Australia, the EU, India, Japan and the US. It is a forum for trade negotiations which sets the global rules governing trade between its members.

Once the UK leaves the UK, and without any other trade model having been negotiated with the EU, its trade with the EU will be governed by the WTO.

One of the main WTO rules is that members must apply the same trade conditions for certain product types to all members (most favoured nation rule). However, special rules apply to groups of countries that have entered into free trade agreements (e.g. the EU and EFTA). This means that UK exports of products to the EU would be subject to the EU common external tariff once it leaves the EU, and the UK would have to comply with EU product standards for exports to the EU.

### **How will Brexit impact on Northern Ireland?**

Northern Ireland is the only UK region to share a land border with another EU Member State. The potential post-Brexit treatment of the border between the UK and Ireland would be a critical issue for the numerous sectors that currently operate freely on a cross border basis. What is more, the Good Friday Agreement is based on the explicit assumption that Ireland and the UK are members of the EU. The issue is complicated by the roles played by cross-border bodies such as the North/South Ministerial Council, the British Irish Council and the British Irish Intergovernmental Conference whose functions include fields of competence of EU law.

It is difficult to see how the Common Travel Area between the UK and Ireland, which predates both countries' membership of the EU, could survive Brexit in its current form, as it is predicated on the basis of common immigration policies underpinned by membership of the EU.

### **What is the impact of Brexit on businesses?**

It is too early to say what the implications for businesses will be. This will become clearer as the negotiations between the UK and the EU take shape and details of the new trading relationship emerge. We have tried to identify the key areas in which businesses are likely to be affected by Brexit:

## **Mergers and Acquisitions**

It is unlikely that we will see substantial change occurring to the legal framework underpinning private company M&A activity as a result of Brexit, as it is largely free from EU regulation. The potential for greater divergence in public company transactions exists, given the impact of EU law here, although it is difficult to see how this could be in the UK's (and particularly the City of London's) interests.

However, we may see changes to the following key areas of corporate transactions:

- Due diligence: for example, if the UK were to depart from the EU Data Protection regime, the processes governing the use of personal data (for example, that of employees) in due diligence may be impacted (for more on data protection, see the relevant section below);
- Merger control: on the rare occasion that a Northern Ireland business is involved in an acquisition which meets the thresholds for the EU Merger Regulation, the parties to the transaction currently avail of the EU's "one stop shop" clearance process. In these circumstances, it would seem likely that Brexit would lead to notifications being required to the relevant EU and the UK authorities (for more on merger control, see the relevant section below);
- Employees: it is uncertain as to how asset purchases may be impacted if the current protections afforded to employees are repealed, or revised; and
- Dispute resolution: alternative dispute resolution processes may grow in popularity if the enforceability of UK judgments in EU states is no longer permissible, or restricted.

## **Commercial Contracts**

Depending on the sector, many commercial contracts refer to EU legislation with varying layers of complexity and application. It would be prudent for all businesses to conduct an audit of their material contracts to determine the level of risk arising from Brexit. A non-exhaustive list of key clauses to consider would include those that deal with applicable and governing laws, compliance with law, jurisdiction, payment terms and force majeure.

It could be argued that "Brexit" is a force majeure event under certain standard form commercial contracts, entitling parties to terminate or delay performance. A careful analysis of the drafting of force majeure clauses would have to be carried out and it may lead to parties taking the cautious approach of expressly excluding Brexit as a force majeure event.

There is a possibility that compliance with law requirements, in the absence of EU harmonisation, will result in an increase in red tape. The UK may voluntarily decide to maintain a degree of harmonisation with the EU following Brexit, at least initially to minimise disruption, however, this is an area that businesses will need to be mindful of in any post-Brexit performance of contracts.

In terms of choice of law provisions, EU legislation (Rome I and Rome II Regulations) currently allows parties the ability to choose the governing law of their contract. It remains to be seen whether the UK will continue to adopt these rules.

Since the referendum, we have witnessed considerable currency fluctuations and it is not unreasonable to assume that this will continue in the run up to, and following, Brexit. If contract payment terms are referenced in Euro or Sterling, parties may wish to build in repricing clauses, or a right to change the applicable currency, or to terminate if the currency applicable to the contract moves outside of a permitted range.

## **Data Protection**

EU data protection laws are implemented in the UK in the Data Protection Act 1998 (DPA). The DPA will continue to apply until it is either amended or repealed. However, the current EU data protection regime is due to be overhauled in 2018 with a new regulation (which will be directly applicable in

member states) and a new directive (which must be implemented by member states). The new regime will see an increase in obligations in relation to data protection enforcement and sanctions for non-compliance across the EU.

If the UK remains a member of the EEA following Brexit, then the proposed new regime is likely to apply, regardless of Brexit. Should the UK choose to leave the EEA, then data protection in the UK may start to diverge from the EU. This would mean that UK businesses may be restricted in the transfer of personal data to the EEA.

It is difficult to assess what the position will be. However, the UK government is well aware of the difficulties that a lack of harmonisation would pose to multi-national companies. One potential solution is for the UK to become an 'adequate jurisdiction' whereby the European Commission would deem the UK as adequate to provide the same level of protection of personal data as that already provided within the EU, thereby allowing the continuing flow of data protection. It can, however, take many years for a status of 'adequate' to be achieved.

### **Intellectual Property**

UK businesses currently enjoy the benefit of EU harmonisation across a spectrum of intellectual property rights. Following Brexit, it is likely that businesses requiring protection in the UK and the EU will be required to make separate filings for EU registered trademarks and designs (Community Design Rights).

Leaving the EU will not affect UK businesses obtaining patent protection through the European Patents Office, as the European Patent Convention is separate to membership of the EU. However, the proposed Unified Patent Court regime would make it possible to obtain patent protection in each of the participating states, which currently include EU member states excluding Spain, Poland and Croatia. As a non-EU member state, the UK would not be able to take part in this new regime.

UK copyright law is enshrined in domestic legislation so it is unlikely that Brexit will have an immediate impact on copyright legislation.

### **Energy**

Northern Ireland and the Republic of Ireland have a combined Single Electricity Market (**SEM**). The SEM is regulated by the SEM Committee which consists of representatives from the Irish and NI energy regulators. In line with EU legislation aimed at creating a fully liberalised internal electricity market, the SEM Committee is currently developing the Integrated Single Electricity Market (**I-SEM**), a new wholesale market on the island of Ireland. The I-SEM is intended to deliver increased levels of competition with the aim of bringing down prices and encouraging greater levels of security of supply and transparency.

The difficulty following Brexit is that the Northern Ireland energy market is closely integrated with the Irish electricity market, which will remain in the EU. The question is, therefore, whether the Northern Ireland government will decide to remain part of the integrated I-SEM, or whether it will wish to withdraw from I-SEM. If it decides to withdraw from I-SEM, the government would have to decide whether to create a separate Northern Ireland electricity market, or whether to integrate the Northern Ireland market with the Great Britain electricity market. At this stage, not least due to the complexity, cost and time involved in decoupling Northern Ireland from the I-SEM, it seems much more likely that Northern Ireland would remain part of the I-SEM. However, this raises a number of constitutional and contractual issues, for example how Northern Ireland will be represented in the operational and regulatory frameworks created under the EU Network Codes, or how EU authorities would make determinations in respect of issues relating to the Northern Ireland part of the I-SEM. Another consequence of Brexit is that I-SEM may become removed from the EU electricity markets.

## **Environmental/Planning**

The impact of Brexit on planning and environmental law is difficult to predict, but early indications are that most of the central tenets of environmental law will remain in their current, or a largely similar form. For example, the concept of 'environmental impact assessment' is now embraced across much of the developed world and is, therefore, not unique to Europe, nor a concept which proponents of major developments often contest. In this context, it is difficult to imagine Brexit leading to any attempt by the UK Government to abandon the concept of environmental impact assessments per se. More likely casualties are the Habitats and Strategic Environmental Assessment Directives, which have been criticised for placing an onerous burden upon planning authorities and for being too prescriptive in nature. Therefore, if the concepts of habitats assessments and strategic environmental assessments will remain, they are likely to do so in a substantially watered down form.

Many of the environmental designations currently in place are derived from European law. However, other designations are the product of international treaties such as the RAMSAR Convention and will not change as a result of Brexit. In a similar vein, much of the protective costs legislation, which affords litigants instigating judicial reviews of planning and environmental decisions the ability to bring such cases with limited costs exposure, is derived from international treaties, such as the Aarhus Convention, rather than EU law per se. Accordingly, there are limited grounds for thinking that Brexit will lead to any substantial decline in the ability of litigants to instigate such challenges on a protected costs basis.

Brexit will require a number of planning policies to be rewritten. Elements of Planning Policy Statement 2 address sites protected at a European level and will need to be changed if the relevant laws are repealed. Local plans currently under preparation will also need to be reviewed post-Brexit. This uncertainty may mean that local councils have an incentive to secure the adoption of their plans in the current 'settled' legal environment.

## **Litigation**

The UK's decision to leave the EU has not yet impacted on litigation/dispute resolution practice in this jurisdiction. The court process is governed by Northern Irish law and, although the substance of same is unlikely to change following Brexit, certain rules may be effected, such as those governing service of proceedings outside the jurisdiction, choice of law, and mutual recognition and enforcement of judgements outside the jurisdiction.

However, in relation to cross-jurisdictional disputes, EU law is significant, as it has a streamlining effect and can create certainty as to where disputes are heard and which laws apply. Without it, parties to a dispute may find the process is slower, issues of forum and law less certain, and enforcement more complicated. In the absence of any indication of what the future relationship between the UK and the EU might look like, it is impossible to say how these issues will play out in the future practice of litigation.

## **Insolvency/Banking**

The implications of Brexit for the financial services sector are potentially far reaching given that much UK legislation and regulation implements, or is otherwise heavily influenced by, EU legislation. A key concern will be the potential loss of passporting rights, which allow a firm which is authorised in one EEA member state to carry on certain activities in another EEA member state, on the basis of its home state authorisation, thus avoiding the expense and inconvenience of obtaining individual licences for each member state in which it operates. It should be noted that passporting rights apply across the EEA and not just the EU. This means that, if the UK remains a member of the EEA, UK financial institutions are likely to retain their passporting rights.

Due to the fact that much of the UK's regulatory regime is directly based on, or implements, EU legislation, there may not be an immediate divergence in the two regimes. However, all the

implementing laws and regulations will need to be reviewed to establish the current position and to introduce changes required as a result of the Brexit negotiations. While this provides an opportunity to reform certain aspects of the current regulatory regime (for example the cap on bankers' bonuses), the more likely outcome seems to be that the UK will want to retain "equivalent" regulatory standards to the EU in order to maintain market stability. The UK may, in fact, want to mirror much of the EU regulation going forward.

At a more granular level, it is likely that all banks and financial institutions will want to carry out a review of their standard documentation, as will trade bodies such as ISDA (the International Swaps and Derivatives Association) and the LMA (the Loan Market Association).

The UK has become a significant hub for restructuring (solvent and insolvent) over the past number of years due to the UK's flexible restructuring regime and the impact of the EU legislation on the recognition of cross border insolvency. The loss, or reduction, of cross border recognition would have a significant impact on that market.

## **Employment**

A significant proportion of the UK's employment laws derive from EU law which means that the referendum result could have a significant impact on local companies. However, although these laws derive from EU law, they are implemented into domestic legislation and will not, therefore, automatically cease to apply upon Brexit. As employment law is a devolved matter in Northern Ireland, the task may fall to our MLAs to consider each piece of legislation.

Many of the EU derived employment laws are now firmly entrenched in our working culture, for instance, our right to paid holiday, maternity leave and pay, and our redundancy rights. It is difficult to envisage any such rights being radically altered. However, there are other EU derived employment laws which are more controversial. Recent judgments on the calculation of holiday pay, for instance, or the much maligned Agency Workers Regulations would appear to be more obvious targets for repeal or amendment. If the UK remains in the EEA or enters into a free trade arrangement with the EU post-Brexit, the remaining EU members might demand adherence to all, or at least, a substantial body of EU employment law.

Brexit will trigger many employment related questions to which we currently do not have any answers. For example, what happens to the EU nationals already living in Northern Ireland and employed in local businesses? They have the right to work here currently by virtue of their country's EU membership. Will they lose that right on Brexit? Will the UK grant an immigration amnesty to them so that they can stay here indefinitely? Will they be required to apply for the right to remain?

## **Competition**

It is unlikely that the UK competition rules i.e. the prohibition on anti-competitive arrangements and the prohibition on abuse of a dominant position, will change when the UK leaves the EU, irrespective of the relationship which the UK will negotiate with the EU. If the UK remains part of the EEA, the UK will be required to adopt the EEA competition rules which are identical to the EU rules. However, regardless of the UK's future relationship with the EU, it is unlikely that UK competition law will change substantially, as it has become enshrined in UK law and most countries across the world have similar competition law prohibitions in place.

One area which will be impacted by Brexit will be merger control. Currently, UK mergers falling within the EU merger control rules must be notified to the European Commission before they can be implemented. Once the EU's jurisdictional thresholds are met, the EU has exclusive jurisdiction over these mergers. Once the UK leaves the EU, parties may have to make concurrent merger notifications to the European Commission under the EU merger control regime, as well as to the UK's Competition & Market Authority under the UK merger control regime. This would increase cost and complexity of

such transactions for businesses and could lead to divergent decision-making, thus increasing regulatory uncertainty.

The Treaty on the Functioning of the European Union (TFEU) prohibits State aid i.e. any aid which is granted directly, or indirectly, by an EU Member State in favour of a particular business, or the production of certain goods/services and which distorts, or threatens to distort, competition and affects trade within the EU. The prohibition is intended to prevent EU Member States from favouring national companies. If the UK does not remain part of the EEA (which has a similar provision), the State aid rules will no longer apply to the UK. However, the WTO regime is built on similar principles to the EU State aid rules and the UK will, therefore, be unlikely to support UK businesses regardless of the trade model it chooses to adopt.

## **Public Procurement**

The European procurement directives are implemented into UK law in the form of the Public Contracts, Utilities and Concessions Regulations. These procurement regulations will continue to apply until such time as they are amended, or repealed.

Following Brexit, the UK procurement regulations may start to diverge from EU procurement law over time. This will, to a large extent, depend on the kind of relationship which the UK will negotiate with the EU. If the UK remains in the EEA, the procurement directives will continue to apply in the same way as before. If the UK does not remain in the EEA, it will have to decide whether it wishes to remain a party to the Government Procurement Agreement (GPA). (GPA is a multilateral agreement between some members of the World Trade Organisation. Its rules are substantially the same as the EU procurement rules.) It is likely that the UK would choose to do so, as the GPA gives UK businesses access to the procurement markets of, for example, the EU, the US, Japan and Canada.

## **Our Brexit team**

We will continue to monitor developments and will issue further updates on Brexit. In the meantime, please feel free to contact any member of our Brexit team if you have any questions or concerns, or if you would like to receive further information.



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