ADDLESHAW GODDARD

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BREXIT

A changing legal landscape?

INTRODUCTION

Yesterday, the UK public voted for the UK to leave the European Union (**EU**). This briefing discusses, in outline, the potential timetable for Brexit, the possible shape that Brexit might take and the potential impact Brexit might have on certain areas of law relevant to your business. The political, economic and legal landscape will continue to evolve, and we remain to see the UK Government's preferred form of ongoing relationship with the EU, but this paper aims to give a flavour of the sorts of issues that might need to be considered if the UK does leave the EU.

Please note that this document is for general information only. It is not legal advice and should not be acted or relied on as being so. Your usual Addleshaw Goddard contacts are on hand to assist with legal queries you might have over the coming weeks and months.

TIMELINE FOR BREXIT

In order for the UK to leave the EU, the Prime Minister must notify the European Council of the UK's intention to leave the EU under Article 50 of the *Treaty of the European Union*. The Prime Minister has announced that it will be his successor who triggers this process. Once the intention to leave is notified, the UK would have a two year period during which the UK would have to negotiate the terms of its withdrawal from the EU.

Assuming the next Prime Minister does notify the European Commission of the UK's intention to leave, then pursuant to Article 218(3) of the *Treaty on the Functioning of Europe* (**TFEU**), the negotiation of the terms of the UK's withdrawal from the EU would be with the Commission – though it is the European Council (comprising the remaining 27 member states) which would ultimately decide whether to adopt the Commission's recommendations (by way of qualified majority). European Parliament consent is also required.

In the event that no withdrawal terms were agreed, then the UK would unilaterally withdraw from the EU, though query whether this would happen in practice. Alternatively (and more likely), the European Council could, by unanimous decision, agree with the UK to extend the two year negotiation period. However, in any event, the withdrawal agreement would not determine the future of, for instance, trading relations with the EU, which would have to be agreed by the remaining 27 EU member states unanimously.

It should be noted that currently there is no scope for the UK to negotiate with individual EU member states in respect of any trade agreement, such power being ceded by the EU member states to the EU itself.

WHAT MIGHT BREXIT LOOK LIKE?

Without any further indication from the UK Government, it is impossible to state what the post-Brexit relationship between the UK and the EU would look like. However, there are many different relationship models (variants of which could be sought by the UK), examples of which can be found in the models of other countries:

Swiss model: the UK would seek to join the European Free Trade Area (**EFTA**) (which currently comprises Switzerland, Iceland, Norway and Liechtenstein) whereby the UK could trade freely with the members of the EFTA. The EFTA also has certain trade agreements with the EU. Membership of the EFTA would still require, however, the UK to comply with numerous EU laws. In addition to membership of the EFTA, the UK would also seek, like Switzerland, to negotiate its own bilateral trade agreements with the EU, giving the UK access to the single market on a sector by sector basis. However, it is likely that, under the terms of such bilateral trade agreements, the UK would still have to comply with certain EU laws to ensure that the UK can export to the EU. As such, whilst there would be no obligation for the UK to adopt EU laws going forward, the UK might have to ensure a level of equivalence in its own laws to ensure it can continue to trade with the EU. Further, this model has afforded Switzerland with only limited access to EU markets in financial services (in elements of insurance business) and, controversially, requires her to allow free movement of people (Switzerland is currently undertaking its own negotiations with the EU, likely to result in a less favourable deal than the one she currently enjoys, following the Swiss public voting against unrestricted immigration between the EU and Switzerland in a 2014 referendum);

Norwegian model: the UK would seek to join the European Economic Area (**EEA**), currently comprising the EU, Norway, Iceland and Liechtenstein; and EFTA. This would allow the UK to continue to enjoy access to the single market (with certain other laws continuing to apply to the UK, for instance, in respect of free movement of people, competition laws, state aid etc.). The UK would therefore have to continue to adopt most EU laws to retain its access to the single market. The UK would also have to continue making payments to the EU budget;

Turkish model: the UK would seek to enter into a customs union with the EU. By complying with certain EU laws, in particular in respect of some goods, the UK could export into the EU without tariffs or customs restrictions, though this would not necessarily cover all exports to the EU (for instance, services would not be captured). The UK would have to apply, however, the EU's common external tariff on imports from outside the EU – though the country of origin rules would not apply to goods falling within the scope of the customs union.

Free trade agreements: numerous countries have entered into free trade agreements with the EU in the past, most recently Canada. Were the UK able to agree such a measure, either in the form of a series of agreements, or in the form of a single comprehensive agreement, this might result in a "clean break" from the EU, save that numerous EU laws would still need to be applied, for instance, when exporting goods into the EU. Such agreements do not generally afford access to services;

World Trade Organization (WTO): this would be the "cleanest" form of break, whereby the UK would trade with the EU as a member of the WTO. The UK would not need to adopt EU laws, and EU law would not apply to the UK. It would be problematic for the UK, however, to continue to offer its goods and, in particular, services to the EU should this model be adopted. Further, the UK would in any event have to comply with relevant product standards and regulations in regard to its exports to the EU. Some have also questioned whether the UK would still have the benefit of WTO treaties if it left the EU.

THE IMPACT OF BREXIT ON UK LAW

The relationship between EU law and UK law is complicated. UK law and EU law has harmonized owing to the adoption of the *European Communities Act 1972*, and a number of UK court decisions have confirmed that EU law takes supremacy over UK law. As such, there are numerous ways in which EU law is applicable in the UK:

- **Treaty provisions and regulations:** the provisions of the EU's treaties, and regulations enacted by the EU, are directly applicable, meaning they do not require any UK law to be enacted to give effect to these (though UK law and regulation is commonly amended to replicate the effect of regulations);

- **Directives:** when directives are enacted by the EU, these are only indirectly applicable, meaning that UK law must be enacted within a certain time frame (usually through UK regulations) to give effect to these directives. If not implemented within the time limit, directives may also have direct effect;

- **Decisions:** these bind only those persons to whom they are addressed;

- **Court of Justice of the European Union (CJEU) case law:** the UK courts must interpret domestic law consistently with EU law, so far as is possible (which includes the case law of the CJEU).

Should the UK leave the EU, the *European Communities Act 1972* would, in due course, need to be repealed, spelling the end of the supremacy of EU law (in the period before withdrawal, the UK would still need to apply EU law). As such, the treaties and regulations of the EU would cease to be directly applicable (as well as directives not yet implemented by the UK), and the UK courts would no longer need to interpret domestic law consistently with EU law. Further, legislation enacted by the UK to give effect to EU law pursuant to the *European Communities Act 1972* may fall away (such as UK regulations like the *Transfer of Undertakings (Protection of Employment) Regulations 1996*). This is likely to cause significant gaps in UK legislation to the extent UK legislation relies on EU law – the UK would need to enact new legislation to fill these gaps. The extent of this exercise will, however, depend on the form that the ongoing relationship with the EU will take – certain possible forms of ongoing relationship may require the UK to continue to apply certain EU laws, meaning these laws may need to continue to be applied in the UK to ensure access, for instance, to the single market. Further, much EU law implements international regulation, which derives from global fora such as the G20 and the Basel Committee on Banking Regulation.

IMPACT BY LEGAL PRACTICE AREA

This briefing now explores some of the sorts of issues, set out by legal practice area, which may be relevant to your business now the UK public has voted for the UK to leave the EU. Importantly, the following considers a scenario whereby the Prime Minister notified the European Commission of the UK's intention to leave the EU, and the UK was unable to negotiate an agreement as to the relationship between the EU which facilitates free trade with it. Under this scenario, EU law would have ceased to be directly or indirectly applicable, and the courts may no longer need to interpret domestic law consistently with EU law in reaching its judgments (the practical effect of the repeal of the *European Communities Act 1972*). That said, this briefing further assumes that UK legislation explicitly enacting EU law would continue to apply, so as to not cause significant gaps in UK legislation.

FINANCIAL SERVICES

Examples of the impact of EU law on UK law

A significant amount of law and regulation governing financial services in the UK, in particular, wholesale financial services, is derived from the EU. Most of this regulation relates to the maintenance of the single market in financial services which is facilitated by the "passporting" mechanism which allows banks and investment firms incorporated and authorised in one EU member state to "passport" those services into other EU member states by establishing a physical branch or providing cross border services – without the need for additional local authorisations.

The impact of EU law in the form of directives and directly applicable regulations is wide-ranging, covering capital and prudential matters (e.g. the *Capital Requirements Directive IV (Directive 2013/36/EU), the Capital Requirements Regulation (Regulation (EU) 575/2013*) and the *Solvency II Directive (Directive 2009/138/EC)*); conduct of business for wholesale financial services (e.g. the *Markets in Financial Instruments Directive (Directive 2004/39/EC)* (**MiFID**), the *European Market Infrastructure Regulation (Regulation EU No 648/2012)* (**EMIR**) and the *Market Abuse Regulation (Directive 2003/6/EC)*); and increasingly the regulation of retail financial services (e.g. the *Payments Services Directive (Directive 2007/64/EC)*, the *Consumer Credit Directive (Directive 2008/48/EC)*, the *Mortgage Credit Directive (Directive 2014/17/EU)* and UCITS (Undertakings for Collective Investment in Transferable Securities)).

Increasingly, the European Supervisory Authorities (**ESAs**) – the ESMA, EBA and EIOPA - and the European Central Bank are playing a role in regulating and supervising the markets, in particular, by the former's issuance of regulatory and implementing technical standards and the latter's involvement in the Single Supervisory Mechanism, a core element in the European banking union for Eurozone banks. The trend is towards increasing pan-European regulation and, in due course, supervision of financial services.

Assuming the UK does leave the EU?

If following yesterday's vote the UK does leave the EU then the most obvious impact would be the potential loss of passporting rights in the absence of the UK being able to negotiate an alternative model affording access to the single market. Currently, the only alternative status which affords access to the single market is an EEA arrangement. However, an EEA arrangement would significantly limit the UK's influence over the EU regulations to which the UK would be subject; would require free movement of people; and has presented some difficulties accommodating the increasing role of the ESAs.

If the UK had to rely on arrangements which left it without access to the single market, it would rely on any transitional or grandfathering arrangements it had been able to negotiate and would, otherwise, default to a patchwork approach to accessing the EU's financial services markets, particularly as WTO rules do not generally facilitate access to services, in particular, financial services. In consequence, the following approach is likely:

- **Third country access:** the UK would seek to exploit opportunities presented by third country access provisions which are currently found in the *Alternative Investment Fund Managers Directive (Directive 2011/61/EU)* (**AIFMD**) which are expected to become effective for equivalent jurisdictions in 2018; and similar provisions in MiFID II, which provide for access from *equivalent jurisdictions* to *eligible counterparties* and *professional clients*, again, likely from 2018. In terms of infrastructure, EMIR provides for recognition of third country CCPs. As for capital markets, there are provisions for mutual recognition of prospectuses whereby EU member states have the power to approve non-EU prospectuses if they are drawn up in equivalent jurisdictions;

- **Checking the regulatory perimeter:** companies would need to consider the relevant legal and regulatory perimeter in each EU member state, as appropriate, as some EU member states take a more or less liberal approach to the provision of financial services from non-EU member states;

- **Local subsidiaries:** in some cases, it may be necessary for UK-based firms to establish local subsidiaries in the EU which would then have EU passporting rights. EU and/or local regulation would impose requirements for these subsidiaries to be sufficiently capitalised with sufficient substance. It may be that these entities would be able to enter into back-to-back arrangements with their UK sister companies to pass back the economic benefit and liabilities to that entity;

- **Exclusive initiative:** it is presumed that EU customers would continue to be able to buy services in the UK at their own exclusive initiative, or through UK branches.

Notwithstanding the various available mitigants, it is clear that it would be very difficult to continue certain business in the UK, for instance, a UCITS fund must, by definition, be EEA domiciled, as must its management company.

In practice

Whilst contingency planning is difficult given the uncertainty as to what a post-Brexit landscape would look like, following yesterday's vote it would be sensible for businesses to assume that access to the single market may not be available after the UK's negotiation with the EU.

During the period of negotiation, EU law would continue to apply, but may become, with the UK's declining influence, more hostile to UK financial services. It is quite possible that the European Central Bank would revisit its ambition to force the clearing of Euro-denominated securities into the Eurozone area, which attempt was recently defeated at the CJEU.

Even in the medium to long term, it is likely that most EU law would continue to apply to UK financial services, even if the UK was left outside the single market, as it would take time to assess:

- what the UK might need to continue to access EU markets, insofar as possible;

- what regulation is derived from the global forum such as the Basel Committee on Banking Supervision or the G20, through the vector of the EU, with which the UK would need to continue to comply; and

- what regulation the UK would want, in any event, in the absence of its own, for example, the *Market Abuse Regulation*.

CORPORATE BANKING

Examples of the impact of EU law on UK law

EU law has impacted on the following provisions contained in loan documentation:

- **Choice of auditor:** The *Audit Directive (Directive 2014/56/EU)* of 16 April 2014, amending *Directive 2006/43/EC* on statutory audits of annual accounts and consolidated accounts, prohibits lenders from restricting a borrower's choice of auditor, although lenders can still impose requirements to ensure that an auditor has the appropriate expertise. The *Audit Directive* has now been transposed into UK law;

- **Increased costs:** *CRD IV* is an EU legislation package, which, amongst other things, includes prudential rules for banks and certain other lenders. Any increased costs for banks arising from complying with *CRD IV* are often capable of being passed on to borrowers under the increased costs provisions contained in corporate loan agreements (essentially these are provisions which seek to compensate lenders for the increased capital cost of complying with *CRD IV*). *CRD IV* comprises:

  - The *Capital Requirements Regulation (Regulation (EU) 575/2013)* of 26 June 2013 on prudential requirements for credit institutions and investment firms; and

  - *Capital Requirements Directive IV (Directive 2013/36/EU)* of 26 June 2013 on access to the activity of credit institutions and the prudential supervision of credit institutions and investment firms;

- **Sanctions:** economic and political sanctions imposed by the European Council (**EU Sanctions**) are often referenced in loan documentation in the representations and undertakings sections;

- **Financial collateral:** the UK's *Financial Collateral Arrangements (No. 2) Regulations 2003* (**Financial Collateral Regulations**) give lenders a right to appropriate financial collateral provided certain conditions are met. The most common form of financial collateral used in the financial markets are cash and securities. The *Financial Collateral Regulations* are relied upon widely in the financial markets;

- **Governing law, jurisdiction and enforcement of judgments:** the Litigation section of this paper takes a closer look at these issues.

Assuming the UK does leave the EU?

The *Capital Requirements Regulation* would cease to apply to the UK on the repeal of the *European Communities Act 1972*.

EU Sanctions provisions which are contained in loan agreements would still apply following Brexit, as compliance with those sanctions provisions by borrowers is not linked to the UK's membership of the EU.

The *Audit Directive* and the *Financial Collateral Regulations* ultimately derive from EU legislation and could be prejudiced if the *European Communities Act 1972* was repealed without any holding legislation being put in place (it is assumed that such holding legislation would be put in place on Brexit).

In practice

To the extent you are not doing so already, it would be sensible to begin conducting due diligence exercises on existing loans to identify the issues arising from Brexit generally. To the extent you conduct lending activities, you should consider reviewing the potential impact of Brexit on borrowers with an EU focus from a credit perspective, in particular borrowers whose licence to do business in the EU is dependent on EU legislation (e.g. financial services).

Industry standard loan agreements based on the Loan Market Association (**LMA**) do not contain that many references to EU law. The key provisions contained in English law loan documentation derive from English common law. As such, it is not expected that Brexit would have much immediate impact on existing loan documentation.

Given the importance of the *Financial Collateral Regulations* to the UK's financial markets the widely held view in the market is that it is inconceivable that the UK would not put in place legislation to preserve the financial collateral regime.

As for choice of auditor, the *Audit Directive* was introduced to reduce lenders' rights to restrict the choice of auditor to the big 4 accounting firms on competition grounds. The *Audit Directive* has been implemented into UK law by secondary legislation – It would seem likely that the UK would introduce holding legislation to preserve these provisions.

The market would generally expect the UK to introduce legislation to also implement the recommendations of the Basel Committee's global recommendations, therefore, as a practical matter, it is not anticipated that Brexit would move the needle on increased costs provisions contained in loan documentation.

COMMERCIAL CONTRACTS

Examples of the impact of EU law on UK law

Commercial contracts may be impacted by changes in a number of areas of law, including tax, data protection and IP, which are dealt with in more detail below. Brexit may also impact on fundamental provisions of contracts, including geographic scope of rights and obligations, and even the governing law which applies to the contract.

Governing law is currently determined by the *Rome I Regulation (Regulation (EC) No 593/2008)* in relation to contractual obligations and the *Rome II Regulation (Regulation (EC) No 864/2007)* in relation to non-contractual obligations. The *Rome I Regulation* contains rules to determine which national law should apply to contractual obligations with an international element and stipulates that courts should give effect to express choice of law clauses. The *Rome II Regulation* contains rules for determining the applicable law for non-contractual obligations.

Assuming the UK does leave the EU?

Uncertainty in relation to commercial contracts could arise in a number of respects. For example, contracts granting rights or imposing restrictions within the EU (such as distribution rights or non-compete clauses) may not cover the UK post-Brexit. Whether or not such rights or impositions would continue to apply in relation to the UK following Brexit would be a matter of contractual interpretation for the courts.

Further uncertainty would arise as a result of the *Rome I Regulation* and the *Rome II Regulation* ceasing to apply to the UK. In relation to the *Rome I Regulation*, it is highly likely that previous common law principles or the *Contracts (Applicable Law) Act 1990* (which implemented the Rome Convention Treaty) would apply in place of the *Rome I Regulation*. This would preserve the parties' contractual freedom to choose the applicable law.

The position in relation to non-contractual obligations would be less clear, since the *Rome II Regulation* does not closely resemble English common law, or the previous English statutory test (contained in the *Private International Law (Miscellaneous Provisions) Act 1995*, part III, sections 11-12). EU member states could be free to apply their own governing law rules, rather than following the *Rome II Regulation*, for disputes connected to the UK. It is highly likely that the UK would have to enter into treaties to replicate the effect of the *Rome II Regulation*. This is because the *Rome II Regulation* changed the previous statutory test which determined the law applicable to non-contractual obligations under English law.

In practice

It is important to note that nothing will change overnight as a result of the referendum result. In relation to consumer contracts, the FCA has already issued a statement stating:

"*Consumers' rights and protections, including any derived from EU legislation, are unaffected by the result of the referendum and will remain unchanged unless and until the government changes the applicable legislation.*"

The leave vote itself has not provided any answers in terms of what exit will look like. All that is known is that things will change.

Contractual uncertainty creates risk for your business and should be avoided. Key existing contracts could be reviewed to assess the impact of changes in law relevant to the agreement (including areas such as tax, data protection and IP) and rights and obligations linked to the EU territory. These considerations should also be taken into account when entering into new contracts.

Looking at the specific example considered above, it is expected there would be little impact if the *Rome I Regulation* were to cease to apply. However, in relation to the *Rome II Regulation*, without an appropriate treaty, there would be confusion as to whether the law applicable to non-contractual obligations between the UK and EU member states was determined by the *Rome II Regulation*, or (under English law) the previous statutory test.

INTELLECTUAL PROPERTY

Examples of the impact of EU law on UK law

The rules surrounding protection of IP rights have been extensively harmonised by EU legislation.

For trade marks, businesses can register a single EU Registered Trade Mark under *Regulation (EC) No 207/2009* (as amended) (**TMR**), which grants protection throughout the EU. Under UK law, businesses can register trade marks for UK protection under the *Trade Marks Act 1994*, and common law rules of passing off can also protect rights. Similarly, rules protecting design rights have also been harmonised and businesses can apply for EU Registered Designs under the *Community Design Regulation (Regulation (EC) No 6/2002)* (**CDR**). Designs can also be registered in the UK pursuant to the UK regime or protected under common law rules. In the event of Brexit, the *TMR* and the *CDR* would cease to apply in the UK.

Patent protection rules under the European Patent Convention - which enables businesses to apply for patents for specific jurisdictions (e.g. the UK) through the European Patent Office - would be unaffected by Brexit. However, Brexit would cause complications for the upcoming Unified Patent Court Agreement (**UPC Agreement**), which aims to harmonise patent protection across Europe and introduce a single registration and enforcement regime.

Assuming the UK does leave the EU?

EU-registered IP rights would cease to automatically grant protection within the UK, meaning that you would need to rely on UK registered rights or common law principles to prevent infringement within the UK, unless additional measures are implemented by the UK. Further, UK courts would be unable to grant EU-wide relief for IP infringement, meaning that if you are concerned that your IP rights are being infringed throughout Europe, including in the UK, you would need to bring separate claims in another EU court, as well as in the UK.

The timing of Brexit would be unfortunate for the upcoming UPC Agreement, causing numerous complications. The UPC Agreement would not cover the UK post-Brexit, but the current drafting anticipates that one court of the UPC would be based in London. In addition, until the UK formally exits the EU, UK ratification is required for the agreement to come into force.

In practice

It is possible that an agreement would be entered into between the UK and EU member states whereby EU-registered IP rights would be automatically converted into UK-registered IP rights, to remove the administrative/financial burden of requiring businesses to register IP rights in multiple jurisdictions. It is likely that interim measures would be implemented during a Brexit transitional period to prevent businesses from losing their IP protection. Nonetheless, you may wish to ensure that core brands are protected by registering them in the UK.

The UPC Agreement would probably be delayed by Brexit and the wording of the agreement may require amendment to remove London as a host for the UPC. More importantly, the strength of the unitary patent would not be as strong as intended and separate protection in the UK would be required. This is likely to mean increased patent protection costs for businesses.

It is also likely that there could be a gradual divergence between EU and UK law over time, complicating the legal landscape and making it more complex and expensive for businesses to protect IP rights. If you are an international business, dealing in the UK and the EU, you would need to comply with two parallel systems to protect your IP.

DATA PROTECTION

Examples of the impact of EU law on UK law

The primary source of data protection legislation in the UK is the *Data Protection Act 1998* (**DPA**), which implements the *Data Protection Directive (Directive 95/46/EC)* and addresses such items as the definitions of personal data, sensitive personal data, the processing of data, notification and registration requirements, consent, rights of data subjects, collection of data, direct marketing, data transfers and sanctions for non-compliance.

The upcoming *General Data Protection Regulation* (**GDPR**), which harmonises data protection laws across the EU, affords enhanced rights to data subjects such as the "right to be forgotten" and data portability and introduces higher penalties for non-compliance, comes into force on 25 May 2018. It will have direct effect in EU member states, and there are no plans to transpose *GDPR* into UK law at present.

Assuming the UK does leave the EU?

Today, the ICO published a statement setting out that "*the Data Protection Act remains the law of the land irrespective of the referendum result.*" This will be the case until the *DPA* is amended or repealed by Parliament and all UK businesses should continue to comply with the *DPA*. Previous judgements of both the English courts and the CJEU will continue to be binding in relation to the interpretation of the *DPA*, at least until the UK leaves the EU (at which point the status of EU jurisprudence will have to be considered). Prior to the *DPA*, the UK enacted data protection measures in the 1970s with the Younger Report on Privacy and the Lindop Report on Data Protection. These were followed by the OECD Guidelines in 1980 which cumulated in the first version of the "Data Protection Act" in 1984. This was expanded in scope by the *Data Protection Directive* which resulted in the *DPA*, which was passed in 1998 and came into full force in 2001. The principles in the *DPA* have remained largely unchanged. It is possible that the UK would adopt an hybrid position keeping parts of the *DPA* and adopting some of the new provisions of the *GDPR*.

In regard to *GDPR*, provided that the UK formally leaves the EU by 25 May 2018, it would not apply in the UK post-Brexit, unless the UK enacts further legislation to implement *GDPR* (and provided that such legislation, if enacted under the *European Communities Act 1972*, is saved by transitional measures – it is assumed that such legislation would be saved). If the UK does not formally leave the EU by 25 May 2018, as is more likely, there may be a period in which the *GDPR* is in force for a transitional period in the UK despite the UK's decision to leave the EU. To the extent that your business offers goods/services to, or monitors, data subjects in the EU, you would still have to comply with the provisions of the *GDPR* in the period before Brexit.

You should also note that, in the event of Brexit, the UK would cease to be automatically designated as a safe destination for EEA personal data meaning companies operating in the EU would need to revise the methods they use to transfer data to the UK (such as implementing model clauses or Binding Corporate Rules).

In practice

As the *Data Protection Directive* would cease to restrain the UK from enacting legislation which is non-compliant with the directive, the UK could adopt standards deviating from EU rules. This could lead to a divergence between UK and EU law over time, complicating the regulatory landscape and making it more expensive for your business to meet its data protection commitments to the extent your business is subject to both UK and EU law post-Brexit.

In practice, as the ICO pointed out in its statement, if the UK leaves the EU and wishes to continue to trade on equal terms with the EU it would have to ensure that its data protection standards are equivalent to the

GDPR. This may require implementation of certain safeguards demanded by the Commission - such as enacting additional legislation (including incorporating the *GDPR* into UK law) and going further to introduce safeguards similar to the EU-US Privacy Shield. Until the UK is designated as a safe destination, if your business operates in the EU, you would need to revise the methods used to transfer data to the UK. You would need to put in place contractual protections such as implementing model clauses or binding corporate rules to ensure compliance.

There is a risk that the UK, which is currently seen as pragmatic and business friendly, therefore may no longer be such a popular data hub to process data from EU offices, as it would no longer be able to offer unencumbered access to EU data markets.

EMPLOYMENT

Examples of the impact of EU law on UK law

Many of the UK's employment rights derive from EU legislation. This includes, for example, employment rights under the *Equality Act 2010* (**EA**), *Transfer of Undertakings (Protection of Employment) Regulations 2006* (**TUPE**), *Working Time Regulations 1998* (**WTR**), *Agency Workers Regulations 2010* (**AWR**), *Part-Time Workers (Prevention of Less Favourable Treatment) Regulations 2000* (**PTW**), *Fixed-Term Employees (Prevention of Less Favourable Treatment) Regulations 2002* (**FTE**), collective redundancy consultation and maternity and parental leave rights.

In theory, leaving the EU provides the possibility of amendment or repeal of many of these laws in the UK and Brexit has, therefore, the potential to substantially alter the UK workplace. However for reasons set out below, it is anticipated that substantial change is unlikely even in the event of Brexit.

Assuming the UK does leave the EU?

Brexit may have the following legal implications:

- Primary legislation such as the EA would remain in place but could be amended;
- Secondary legislation such as *TUPE*, *WTR* and *AWR* could fall away on repeal of the *European Communities Act 1972*, unless steps were taken to keep such legislation in place (it is assumed that secondary would be preserved at first so as to not cause significant gaps in UK legislation);
- Common law decisions in the UK are currently influenced by binding CJEU decisions. As such, new UK decisions would be required to "override" existing case law, with lower courts being obliged to wait for higher courts (such as the EAT, Court of Appeal and Supreme Court) to overrule any existing precedents. This would naturally take time to filter through, creating areas of uncertainty in the meantime for employers and employees. In addition, although there could be more employer-friendly decisions at common law once CJEU influence is withdrawn, this may impact (and increase) trade union activity;
- Immigration issues for EU nationals living in the UK (and vice versa) may arise and it may be that EU nationals wishing to work in the UK are subjected to the same visa restrictions as non-EU nationals. It may, therefore, be far more difficult (and costly) for you to recruit and/or retain workers from the EU;
- Employment laws which are not derived from EU law would obviously be unaffected by a withdrawal. This includes, for example, the right not to be unfairly dismissed, statutory protection for whistleblowers and the right to be paid in accordance with the national minimum wage.

In practice

In reality, Brexit might not have such a profound influence on the UK workplace as might otherwise be expected, with the UK Government being more likely to retain existing primary and secondary legislation (the assumption throughout this discussion) and to continue to follow (and, in many cases, enhance) EU-derived employment legislation. This, in turn, is likely to lead to UK courts viewing CJEU decisions as persuasive even where they are not binding. In reality, therefore, there may only be deregulation and change in a limited number of areas in the employment legal landscape:

- It is highly unlikely that there would be a wholesale reform of primary legislation such as the *EA*, the principles of which are now entrenched in UK law and culture. Accordingly, any major reduction in

employees' rights would likely be politically unattractive. However, it is possible that some amendments could be made should European directives no longer apply.

- It is also unlikely that the UK Government would allow the automatic repeal of all secondary legislation, however it may repeal and/or amend such legislation over time.

- Several UK regulations have "gold-plated" many EU employment laws, making some amendments less likely. For example, while parental leave rights are a combination of EU and UK provisions, they are ingrained in UK law and, as such, it is unlikely that the UK would introduce backtracking reform in any respective legislation. It is also unlikely that there would be any amendments to the service change provisions under *TUPE*, though there may be a relaxation of other parts of *TUPE*, such as allowing for the harmonisation of contractual terms following a business transfer.

- The secondary legislation that would most likely be the target for more wholesale amendment is the *WTR* and *AWR*, both of which have long been unpopular with UK employers:

  - For the *WTR*, there has been significant case law over the last couple of years regarding the calculation of holiday pay, which has subsequently become a rather convoluted area. This area may be simplified, along with a reduction of administrative burden on employers, for example, in relation to their record-keeping obligations.

  - In relation to the *AWR*, there may be a reduction in the burden of providing equal working conditions (including pay, annual leave, working hours and entitlement to benefits) to agency workers as ordinary employees.

Obviously such reform is likely to be welcomed by employers in light of the potential cost benefits to businesses but it may be relevant to note that, in cases where primary and/or secondary legislation is amended in a manner that is in favour of the employer, there may be an increase in trade union activity as a consequence.

Finally, although it is likely that the position of EU nationals already working within the UK would be protected for as long as they continue to work, in the absence of an agreement on the free movement of labour, EU nationals not already based in the UK may be subject to the points-based system currently applied to non-EU nationals, although there would be challenges in terms of the introduction and administration of such a system. Employers may therefore struggle to continue to recruit EU nationals, with the hiring of employees from the EU talent-pool becoming more administratively onerous and more expensive both for you as the sponsoring employer and the employee themselves.

PENSIONS

Examples of the impact of EU law on UK law

The most significant impact on UK pensions is likely to be economic rather than legal. All occupational pension schemes rely on the support of their employer(s) and therefore any impact on the employers' businesses would impact on pension schemes. All pension schemes are significant investors and many invest a material proportion of their assets in UK and European equities and corporate bonds, as well as UK gilts. Any impact on the economy has the potential to impact significantly on pension schemes' assets.

European legislation relating to financial services, solvency, data protection and employment impact on pension schemes.

Unlike other financial services, pensions are generally not cross-border. Any changes to financial services regulation (see above) would impact on pension providers and investment managers. Some EU-based legislation such as the *Directive on the activities and supervision of institutions for occupational retirement provision (Directive 2003/41/EC)* (**IORP**) has led to UK-based law (under the *Pensions Act 2002* (**PA 2004**)) relating to funding of defined benefit pension schemes. A proposed IORP II would have seen the requirements tightened up which at its most extreme could have required defined benefit schemes in the UK to become fully funded. Although it is not currently expected that this will be included in IORP II, it is possible that this could be revisited in the future.

Many of the UK's employment rights which derive from EU legislation including equality legislation and *TUPE* also impact on the provision of pension benefits. As explained above, it is not anticipated that the UK would make substantial changes to these laws immediately as a result of Brexit.

Assuming the UK does leave the EU?

Brexit may have the following legal implications:

- Pensions legislation, in particular the funding requirements in the *PA 2004* would remain in place. However, it could be amended and the risk of the funding of UK defined benefit pension schemes being impacted by EU legislation in the future would fall away;

- Employment legislation such as equality legislation would remain in place but could be amended. It may therefore be possible to simplify areas of equality legislation which do not sit easily with pensions such as age-related pension contributions and the requirement for single sex annuity factors. For example, it may be possible to amend the legislation to deal with inequalities caused by Guaranteed Minimum Pensions without the need for schemes to undergo complex equalisation processes;

- *TUPE* could fall away if the UK chose to repeal the *European Communities Act 1972*, unless it took steps to keep such legislation in place. Again, it may be possible to simplify the pensions aspects of *TUPE* to address the current uncertainty about what benefits transfer under *TUPE* where the transferor has a defined benefit scheme.

In practice

It seems likely that the impact on pensions would be primarily economic rather than legal.

Any legal impact is likely to arise gradually over time rather than as a direct impact of Brexit since it seems unlikely that relevant UK legislation would be repealed.

COMPETITION

Examples of the impact of EU law on UK law

EU antitrust law prohibiting anti-competitive agreements and abuse of dominance (Articles 101/102 *TFEU*) is largely mirrored in UK antitrust law as contained within Chapter I/II of the *Competition Act 1998* (**CA 98**). UK legislation imposes an added obligation on the UK competition regulator – the Competition and Markets Authority (**CMA**) – and the UK courts to interpret UK competition law consistently with EU legislation (section 60 *CA 98*).

The UK has yet to transpose the *EU Damages Directive (Directive 2014/104/EU)*, which provides for a harmonised approach of national systems towards private damages actions, into UK law.

Under the "one-stop-shop" rule (contained within the *EC Merger Regulation (Regulation (EC) No 139/2004)*) companies have to notify transactions meeting certain thresholds to the Commission and can obtain a single EU-wide clearance for cross-border mergers.

EU state aid rules (Articles 107-109 *TFEU*) have direct effect and are not currently transposed into UK law, that is to say, such rules are not explicitly incorporated in any UK law.

Assuming the UK does leave the EU?

In terms of antitrust law, assuming that the UK decided to retain currently enacted legislation, this would be likely to result in tension between the need to ensure certainty and consistency of approach and the degree of cooperation and convergence with EU competition policy and law deemed politically appropriate. Much would depend on the precise arrangements negotiated with the EU after Brexit. It is certainly possible that over time UK competition policy could diverge significantly in terms of emphasis and process from that of the EU.

In regard to private enforcement, Brexit would remove the obligation to transpose the *EU Damages Directive*. This is likely to mean that UK law as regards damages for competition infringements would remain as is. It should be noted however that the existing UK position already largely addresses the measures set out in the *EU Damages Directive*, and in some areas goes beyond it, for example, in relation to opt-out class actions *(Consumer Rights Act 2015)*.

As for the "one-stop-shop" rule, this would cease to apply following Brexit. As a result a company carrying out a merger with a European dimension would need to file with the Commission and potentially also with the CMA. Further, the CMA would no longer be able to "call in" a transaction from the Commission on the basis that it mainly affects the UK.

State aid rules would also cease to apply, owing to the fact these have direct effect and are not transposed into UK law.

Finally, as UK lawyers would no longer be members of an EU member state's Bar or Law Society, English law advice would no longer be privileged in the context of Commission antitrust investigations, which in turn could affect the ability of English firms to advise on such investigations (or potentially even provide competition advice on EU-wide commercial arrangements).

In practice

As currently framed, EU competition law applies to businesses ("undertakings") irrespective of whether they are based in an EU member state – its application depends upon whether those businesses have an effect on trade between EU member states. Thus, where a UK business infringed EU competition law by (for example) abusing its dominant position, the EU rules would continue to apply to that undertaking.

The UK rules, as set out in the *CA 98* and the *Enterprise Act 2002*, would remain in force in the event of Brexit. Uncertainty would arise as to the proper interpretation of the large body of EU case law currently relevant to UK competition practice. The CMA is currently under a legal obligation to construe UK competition law in accordance with the EU position. This obligation would remain in force until repealed (which it is assumed would eventually occur), after which it is envisaged that the UK position would slowly begin to diverge from that of the EU. The approach to interpretation of laws would also need to be resolved. The current EU approach to interpretation is purposive, whilst the common law approach taken in England, Wales and Northern Ireland is varied. The UK Government would therefore need to decide how case law should be interpreted going forward, with the option of viewing it as binding, persuasive, or non-applicable.

In respect of competition litigation it is likely that the UK's status as forum of choice for damages actions would be affected – perhaps positively. For instance, the UK courts have traditionally been more willing to disclose leniency materials than other European jurisdictions. The *EU Damages Directive* supports the EU position that leniency materials should not be disclosed. In the event of Brexit this might not be implemented by the UK Government, paving the way for easier access to material for claimants.

One positive effect of Brexit might be the speeding up of cases. Currently references/appeals to the CJEU can result in a final decision not being reached for 10 years post-Commission decision. It is likely (or hoped) that the UK courts would be able to resolve issues more quickly, although it is also noted their workload would increase.

The EU block exemptions, which permit certain types of behaviour which would otherwise be caught by antitrust rules, would cease to apply. In the absence of similar exemptions being introduced in the UK, some currently legitimate practices, for instance, certain arrangements between suppliers and distributors of goods or services, could be held to infringe UK competition law.

The state aid rules are a construct of European law, and post-Brexit it would be open to the UK to offer greater levels of financial support to UK companies. However, it is questionable whether the UK would choose to do this as, historically, it has taken a non-interventionist approach to supporting business.

The UK's soft power in the sphere of EU competition policy would lessen. The UK has been very influential in this sphere in recent years, for example, the *EU Damages Directive* largely imports current UK practice into EU law. Taking the CMA out of the European Competition Network and out of EU policy generally is likely to lead to some divergence of thinking.

Finally, the EU competition rules would continue to apply to agreements or conduct of UK business to the extent that it has an effect within the EU. UK companies involved in cartels would still be liable to prosecution by the Commission (as experienced by Asian and American companies previously). The main procedural difference would be that the Commission would lose its power to carry out dawn-raids in the UK (or ask the CMA to do so). In practice, however, it seems likely that the UK would allow/facilitate investigations.

The above outlines why it is not anticipated that Brexit would cause fundamental changes to the UK competition law regime, since the UK's national laws are very similar to the EU rules. The future of section 60 *CA 98* will likely be key. Additionally, the UK's loss of influence will likely also be felt in the medium term.

TAX & STRUCTURING

Examples of the impact of EU law on UK law

EU legislation and case law has had a considerable impact on the UK tax system. This is most obviously the case with VAT, which is fundamentally a European tax that EU member states are required to implement as a result of EU membership – in the UK's case through the *Value Added Tax Act 1994* and the plethora of other primary and secondary legislation that surrounds it. It is also true in the case of direct taxes, where tax legislation has frequently had to be introduced or amended to address decisions of the CJEU (for example the UK's provisions on the use of corporation tax losses and surrenders of group relief, affected by the CJEU's decisions in the Marks & Spencer litigation), transfer pricing and controlled foreign companies.

The UK Government has also frequently found itself defending litigation brought by taxpayers who have claimed that various features of English law infringe EU law, entitling them to damages or restitution – see for example the Littlewoods VAT litigation and the ongoing saga of the Franked Investment Income test claimants, which has now been before the CJEU three times.

Looking to the future, further harmonisation and integration of both direct and indirect tax systems across EU member states had been proposed. The Common Consolidated Corporate Tax Base, on which the UK had so far not looked favourably, has been revived, and proposals have been put forward for the introduction of in effect a single EU-wide VAT area. The EU has also been an enthusiastic backer of the OECD's proposals on Base Erosion and Profit Shifting (**BEPS**) and has put forward its own proposals to implement these across the EU.

Assuming the UK does leave the EU?

Brexit would probably not lead to any immediate, fundamental changes in the UK's tax system. There is a considerable amount of domestic legislation that either has been enacted to implement EU law or has been drafted (or amended) to take into account EU law (the UK's VAT system is again an obvious example), and which would not become immediately ineffective as a result of Brexit.

Assuming that, at least in the short to medium term, a good deal of the legislation that was implemented to comply with EU law remains in place, it would be interesting to see how the English courts would approach European case law concerning the EU rules that our domestic legislation implements, post-Brexit. One possibility is that decisions of the CJEU continue to be regarded as persuasive by the English courts, at least until domestic legislation has been sufficiently amended that it could no longer be said to be implementing the UK's previous EU obligations. Whether or not HM Revenue & Customs would take the same approach is, however, unknown.

The UK is also party to a large number of international tax treaties and agreements that have nothing to do with the EU, such as its network of Double Tax Treaties. None of these would be directly affected by Brexit. However, on Brexit, the UK would lose the benefit of the *Parent Subsidiary Directive (Directive (EU) 2015/121)* and the *Interest and Royalties Directive (Directive 2003/49/EC)*, which may affect the attractiveness of the UK as a place to locate European headquarters of multi-nationals. Given the speed with which the UK has moved to implement (or anticipate) BEPS, FATCA and other information reporting regimes, it also seems unlikely that Brexit would do more than slow down the UK's efforts in these areas.

In practice

It seems unlikely that a UK government of any political persuasion would choose to repeal tax legislation that brings in material amounts of revenue for HM Treasury, for example by repealing the VAT legislation, even if the terms of Brexit allowed it to do so.

In practice, at least part of the position will depend on what terms of exit the UK is able to negotiate. The UK's customs duty position in relation to the remaining EU member states, for example, is likely to depend on which model the UK Government decides to follow (assuming in practice they are all available).

More generally, the UK would have more freedom to frame and amend its tax legislation. This could include measures favourable to business generally, or to specific sectors, with the aim of enhancing the attractions of the UK as a base for multi-nationals or for particular activities. That sort of tax-based competition might be particularly attractive to the UK if its businesses lost access to the EU's single market and it had to enhance its offering in other ways. Part of that enhancement could be to modernise various aspects of, for example, the rules on VAT and financial services (which have failed to keep pace with commercial innovation in that sector), which the UK is currently unable to update unilaterally (though suggestions that the UK could enter into tax competition with remaining EU member states would be unlikely to be welcomed as the UK negotiates the terms of Brexit).

On the other hand, the UK might take the opportunity to repeal or amend various provisions it has been obliged to introduce in order to comply with decisions of the CJEU, such as the rules on cross-border surrender of group relief. It seems unlikely, however, that the UK would choose to introduce a raft of business-unfriendly tax measures in the aftermath of Brexit given that there would presumably be a clear need to demonstrate that the UK remained not only "open for business" but eager to attract new taxpayers.

More immediately, there is some prospect of an emergency budget to react to the referendum result and the anticipated economic uncertainty that will result from this. The contents of such a budget would obviously be highly political but may well involve tax-raising measures for business and/or individuals if the UK Government thinks the extra funding will be required. Both timing and content will presumably be affected by the forthcoming change in Prime Minister.

LITIGATION

Examples of the impact of EU law on UK law

Regulation (EU) No 1215/2012 recasts the *Brussels Regulation (Regulation (EC) No 44/2001)* on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (**Brussels Regulation**). *The Brussels Regulation*:

- determines which EU member state's courts will have jurisdiction in a dispute; and
- governs the recognition and enforcement of judgments between EU member states. Currently, a judgment in an EU member state may be recognised and enforced through the courts of another EU member state without the need for separate proceedings.

The *EU Service Regulation (Regulation (EC) No 1393/2007)* relates to the service in EU member states of judicial and extra-judicial documents in civil or commercial matters. Where the European regime confers jurisdiction on the English Court, permission to serve proceedings outside jurisdiction is not required. Consequently, where these conditions are met, a claimant may serve proceedings and other documents on a defendant who is domiciled in another EU member state.

Assuming the UK does leave the EU?

The *Brussels Regulation* would no longer apply to matters of jurisdiction. There would be a risk that jurisdiction clauses drafted in favour of UK courts could be undermined by proceedings being commenced in other EU member states. To avoid the need for anti-suit injunctions, the UK would need to agree and implement an alternative arrangement. The *Brussels Regulation* would also not apply to enforcement – there would be no automatic recognition and enforcement of judgments between the UK and EU member states. Without an alternative being put into place, the UK would need to rely on other regimes, including old common law provisions.

In regard to service, the *EU Service Regulation* would no longer apply. Permission to serve proceedings out of the jurisdiction would be required. This would increase both the time and costs of serving on an EU domiciled party.

In practice

Owing to the disapplication of the *Brussels Regulation* in regard to jurisdiction, the neatest alternative arrangement could be for the UK to enter into an equivalent agreement, such as the Lugano Convention (**Convention**) which governs issues of jurisdiction and enforcement of judgments between the EU member states and Iceland, Switzerland and Norway. This Convention was designed to provide a similar framework to the *Brussels Regulation*, so many of the provisions contain parallel principles. However, there are certain differences, for example the recast of the Brussels Regulation prevents parties from tactically commencing proceedings in a notoriously slow jurisdiction in an attempt to avoid a more efficient jurisdiction being "first seized", known as the "torpedo" tactic. Such provisions are notably absent from the Convention. As a result, were the UK to sign up to the Convention, while the jurisdictional consequences would be relatively limited, there may be a re-emergence of the delaying "torpedo" tactic. Were the UK not to enter into a parallel arrangement of this type, businesses across the UK entering into European-related contracts may come under pressure to give jurisdiction to EU member states.

As for service, the relevant European regime includes the *Brussels Regulation* and the Convention, so the most appropriate alternative for the UK following a split from the EU could be for the UK to adopt a parallel agreement (such as the Convention), which would bring it back within this framework.

Finally, in terms of enforcement, without an agreement equivalent to the *EU Service Regulation* put in place, the UK could see an increase in the popularity of arbitration given the wider enforcement provisions of the New York Convention.

Until this uncertainty has been resolved, British businesses entering into transactions with European counterparts would do well to consider carefully their service, security and dispute resolution mechanisms to ensure they are robust enough to allow for swift, cost efficient litigation and judgment satisfaction or enforcement.

INSOLVENCY

Examples of the impact of EU law on UK law

Regulation (EC) No 1346/2000 on insolvency proceedings (and the *Recast Regulation on Insolvency Proceedings* which is due to come into force at a later time) (**Insolvency Regulation**) deals with:

- the jurisdiction for a debtor's insolvency proceedings;
- the applicable law to be used in those proceedings; and
- the mandatory recognition of those proceedings in other EU member states.

With the exception of insurance undertakings, credit institutions, collective investment undertakings and investment undertakings that provide services involving the holding of funds or securities for third parties, the *Insolvency Regulation* applies to certain insolvency proceedings in respect of all individuals and corporates.

Where a debtor has its "centre of main interests" (**COMI**) in an EU member state, the *Insolvency Regulation* provides that it is that EU member state which is the appropriate forum for the main insolvency. Recognition of those proceedings is thereafter automatic in other EU member states.

Assuming the UK does leave the EU?

On Brexit, without an alternative arrangement, the *Insolvency Regulation* would not have direct effect and would cease to apply automatically to the UK.

Brexit would have limited impact on the day to day laws affecting insolvency in the UK or on directors' duties in relation to insolvent companies. However, it would have an impact on cross border insolvencies, especially in situations where a debtor has operations in several EU member states, which could lead to issues regarding conflict of laws.

On a basic level, Brexit would mean that UK insolvency proceedings would no longer benefit from automatic recognition in other EU member states and vice versa. Instead, UK officeholders would have to seek recognition in the EU in order that English insolvency proceedings are recognised in that jurisdiction. This will be relevant where a debtor has assets situated across the EU.

In practice

In practice, as stated above, little would change with regard to the law that applies to domestic insolvencies. However, Brexit would impact the recognition of English insolvency proceedings in the EU, and the UK would have to negotiate a bespoke arrangement where the *Insolvency Regulation* continued to apply for a number of reasons (for example, to enable European restructurings with companies with subsidiaries in different European jurisdictions to be possible). In addition, if insolvency practitioners appointed by the English courts are unable to be recognised quickly in European jurisdictions, the realisations for creditors from those proceedings could be significantly reduced.

The UK would apply its own domestic laws to determine jurisdiction in opening compulsory liquidations, administrations, CVAs, IVAs and bankruptcies as the concept of COMI and establishment would no longer determine jurisdiction.

In respect of having these insolvency proceedings recognised in the EU (for example, for the purpose of realising assets located there), officeholders would either have to comply with domestic laws in EU

countries relying on the doctrine of comity or they would have to open separate territorial proceedings in those EU countries where assets are located.

The UK has historically been viewed as a fair and popular jurisdiction in which to have insolvency process dealt with, and there has been a great deal of "forum shopping" in years gone by. With the abolishment of COMI and establishment to determine jurisdiction, the UK could see a drop in the number of EU corporates and individuals who are able to have their insolvency processes dealt with in the UK.

As an alternative to the *Insolvency Regulation*, section 426 of the *Insolvency Act 1986* would be a possible alternative tool in relation to recognition.

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