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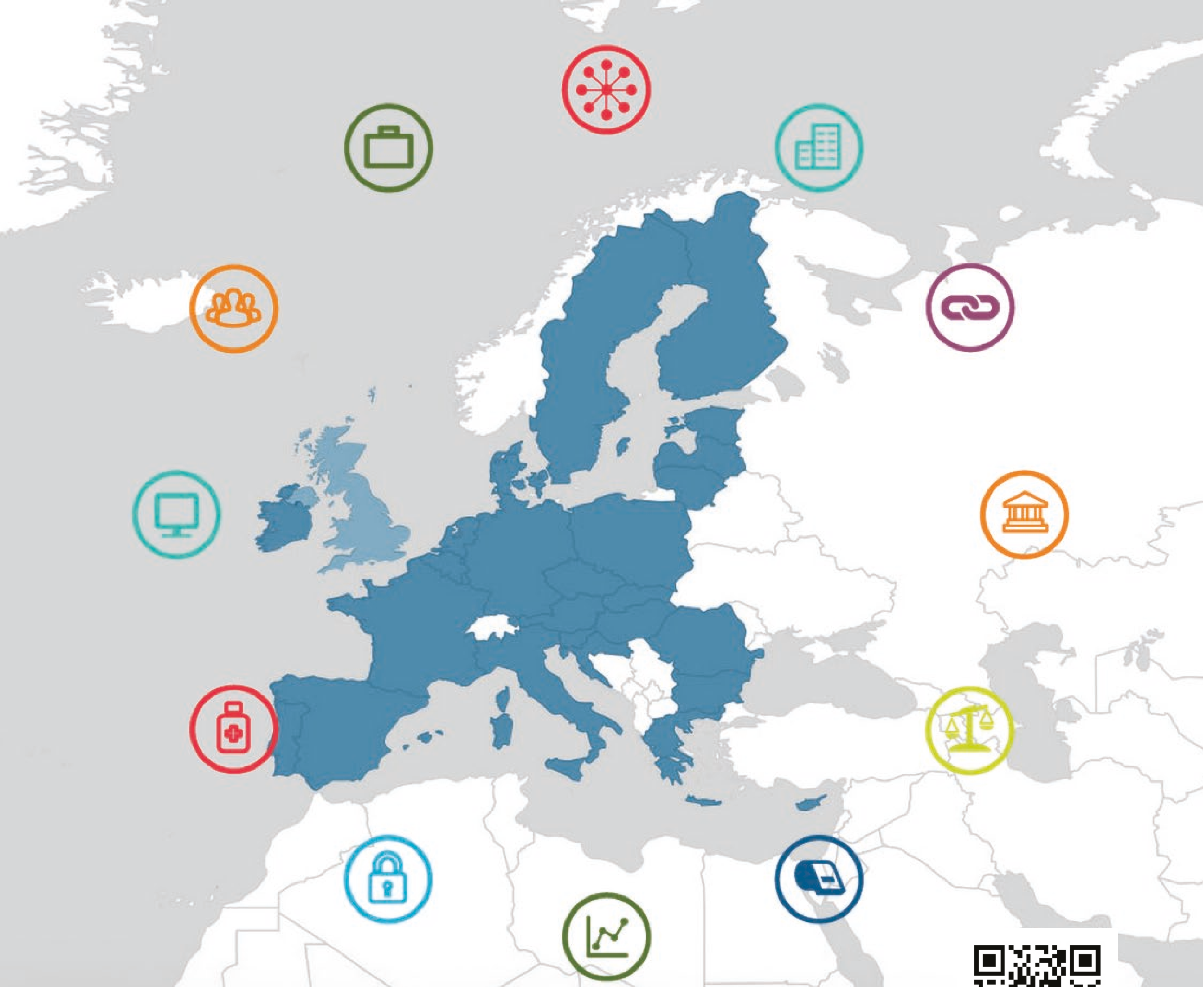
The Brexit Effect

The legal implications behind the headlines



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Negotiating a Post-Brexit world – an overview

A referendum will be held in the UK on 23 June 2016 to determine whether the UK should remain in the European Union (EU) or leave it.

The UK may be the epicentre of the decision but the UK leaving the EU (Brexit) would have implications for clients and countries throughout the world if they trade with, invest or operate in the UK. Its ramifications may affect how businesses are structured across the EU. Many analysts expect that the market impact of Brexit would be significant. Businesses will need to understand how to negotiate and influence the new legal landscape.

As an example, the "passporting" system - used by many US financial institutions and insurance companies to conduct activities across the EU by virtue of having a base in London - would lapse unless the UK agrees a replacement regime with the EU before Brexit occurs. A French or German institution "passporting" its activities into the UK would face the same issue in reverse. Reverting to WTO tariffs on Brexit would increase costs to UK businesses of selling goods into the EU and other countries that currently have preferential arrangements and could either increase costs of importing or reduce UK revenues derived from tariffs.

Law is at the heart of the Brexit debate. If the UK exits the EU, it would fundamentally change the UK's trading relationship with the EU and the rest of the world, as well as its regulatory environment. How those legal and regulatory arrangements are replaced will have an impact on the UK, the rest of the EU and the other markets which trade with the UK under EU FTAs. There are a range of potential post-Brexit scenarios and the outcome will depend on what the UK is able to negotiate with the rest of the EU and its trading partners in the rest of the world. Hogan Lovells has a global network of legal experts who can help clients to assess and navigate a post-Brexit world.

The Exit Process

Brexit will not occur immediately if there is a vote to leave. The exit process is triggered by a notice issued by the UK Government under EU treaties.

The exit process is unprecedented and wholly untested – it provides for membership to lapse two years after notice is given unless all 27 Member States agree an extension. An extension is likely to be required – the UK Government estimates it will take over a decade to replace all the legal arrangements in place through the UK's membership of the EU.

The UK's and the EU's exit negotiations will need to cover arrangements for the UK's withdrawal from the EU (e.g. withdrawing its representatives from EU institutions). As part of the exit process, the UK will also be seeking to negotiate the terms that will govern its on-going relationship with the EU following the loss of its EU membership terms.

On Brexit, the UK will also stop benefitting from the free trade agreements (FTAs) put in place by the EU for over 50 markets (and those currently being negotiated). The UK would need to put in place bilateral agreements with each of those markets to replace any benefits currently derived from the EU's free trade agreements.

Various alternative models to EU membership have been mooted and analysed including: EEA membership (like Norway); bilateral accords plus EFTA (like Switzerland); a customs union (like Turkey); an extensive FTA (negotiations on agreeing an FTA with Canada have lasted over seven years); or, where no alternative arrangements are agreed before Brexit occurs, relying purely on WTO rules (plus, where applicable, EU "third country" provisions).

The eventual outcome would depend both on the model which the UK chooses to adopt and the terms which it can negotiate with the EU and the rest of the world. The UK Government's report on alternative models to EU memberships concluded that none of the alternatives come close to delivering the benefits for the UK of retaining EU membership. The "Out" campaign has not yet confirmed what model it considers would deliver the benefits it seeks from Brexit.

It seems likely that the outcome will not match precisely any of the mooted models but instead will be formed by bespoke bilateral arrangements. These arrangements will essentially be the output of a commercial, but highly political,negotiation, reflecting all countries' priorities and possible areas of compromise.

How can Hogan Lovells help?

Hogan Lovells are experts in guiding their clients through complex commercial negotiations, international trade arrangements, and engagement with governments and international bodies. Business strategy can be optimised ahead of Brexit by assessing the legal and commercial implications of Brexit: identifying the key elements of existing arrangements that need to be safeguarded and the opportunities for improvement, and then undertaking a negotiation assessment to identify the rights that the UK would retain irrespective of the Brexit negotiation, i.e. under WTO rules and "third country" rules, as well as the benefits the UK is likely to try to secure from the EU and what the UK could, technically and politically, offer in return. This assessment could be used to anticipate both the impact of the likely outcome of the Brexit negotiation on a business, perform a gap analysis to assess potential exposure and enable it to inform the debate, lobby for key protections and contingency plan.

Inevitably a negotiation involves an assessment of what each party's key priorities are and with 27 decision-makers on the other side of the negotiating table that assessment is complex. But it begins by analysing the parties' core objectives, assessing their baseline position, understanding both the benefits they are each seeking to secure and what value they can offer in return. Insights gained from our Hogan Lovells teams in jurisdictions and sectors across the negotiating spectrum equip us to assist with that assessment.

Although much remains uncertain in relation to Brexit, it is important for UK plc to understand its potential impact and inform the debate. This impartial analysis supports that process by assessing the implications of Brexit on the legal structures which currently underpin a variety of sectors.

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Process and implications across sectors

Brexit does not happen immediately if the UK votes to leave the EU. It would happen at the end of an exit process, outlined below, which would be triggered by the UK Government but remains untested and uncertain. Brexit would have implications for the UK's regulations and legislation as well as impact on areas of law which apply across sectors.

Summary:

- If the UK votes to leave the EU then there will be a transition period of two years under Article 50 of TEU before it takes effect – any extension to that period will require the agreement of the remainder of the EU ("rEU") – it is expected that an extension would be required.
- EU law is embedded in UK law and the legislative process would need to replace or replicate within the transitional period – the scope for divergence will be determined by the need to remain aligned with the EU for trading, treaty or other political reasons
- The section below focusses on the process for a Brexit and key impacts which would apply across sectors, including on contracts generally, and highlight issues for certain pension schemes, the energy markets, the aviation sector and international trade agreement

The UK Government has committed to allowing voters to decide in a referendum on whether the UK is to remain a member of the EU ("IN") or to leave the EU ("OUT"). If the UK votes "OUT", it will remain in the EU for a transition period before the UK's exit from the EU ("Brexit").

Many of the economic and political implications of Brexit will be driven by its impact on the legal mechanics which underpin core sectors of the UK economy. Assessing this involves understanding how the UK's membership of the EU is embedded in legal structures critical to their operation and the scope of the task involved in replicating or replacing them. The structure of the UK's future relationship with the EU and the rest of the world following a Brexit could take many forms, from membership of the EEA/EFTA to treaty-based relationships. As the debate progresses proponents of Brexit will need to clear what they envisage "OUT" would look like so that its relative merits can also be assessed.

Brexit process: Article 50 of The Treaty on the European Union ("TEU"), is the exit clause for members who wish to withdraw from the EU. Article 50 of the TEU, s an as-yet-unused provision, introduced by the Treaty of Lisbon which sets out the process that is to be used when a Member State wishes to leave the EU. If UK voted to leave then it would notify the European Council of its intention to secede from the EU and a withdrawal agreement would be negotiated between the EU and UK. The Treaties would cease to be applicable to UK from the date of the agreement or, failing that, within two years of the notification (unless it is agreed by all other EU Member States to extend this period).

Regulation and legislative process

The UK has its own legal systems comprising its three legal jurisdictions of England and Wales, Scotland and Northern Island (for ease of reference jointly referred to in this note as "UK Law") which is enforced by its own independent court systems. However, a great deal of law which currently applies in UK is derived from EU law in two ways:

- directly, without the need for any domestic implementing legislation, in the form of EU Regulations; and
- indirectly, in the form of EU Directives which have to be implemented by Member States with domestic implementing legislation.

If Brexit required a repeal of the European Communities Act (ECA), then secondary legislation which is incorporated into UK law by the ECA would be likely to fall. However, any primary legislation (which has been implemented through a freestanding UK statute to incorporate EU rules into UK law) would still stand. This would cause inconsistencies and gaps in the UK's legislation which would need to be addressed in the transition period.

Going forward, the UK will need to decide how much, if any, EU law it wishes to retain in UK Law post-Brexit with a range of possibilities from a clean break through to mirroring EU law in UK law. Depending on how much EU law it decides to retain, UK may need to develop and implement a framework of regulators and new legislation across each of its three legal jurisdictions to cover matters previously dealt with on an EU-wide basis.

In theory, UK could decide to make UK law entirely free of EU law, but the practical reality is that for businesses trading with rEU post-Brexit they would still have to comply with EU law in their contracts, advertising, commercial practices, dealings with consumers and EU production standards. As a minimum, businesses would need to monitor two parallel statutory and regulatory systems. In some cases, the divergence between these may become sufficiently significant as to have a material impact on their trade.

In terms of legislative process alone, the scale of the task involved in amending, replacing or replicating the EU laws which are now integral to UK law but would fall away on Brexit should not be underestimated. Given that the UK would no longer be part of the EU it may be that existing UK legislation will need to be amended to reflect that and mechanisms will be needed to deal with regulations which are directly applicable under EU law but would cease to be on Brexit. Clearly some transitional arrangements would be needed but, if the UK wishes to maintain alignment with such EU laws going forward, it would need to consider how to deal with amendments which are subsequently made by the EU to the equivalent EU laws including the opportunity for UK parliamentary scrutiny. The process adopted or the amendments introduced may themselves be subject to legal challenge if due process is not observed.

Contracts which refer to a territory
Many contracts include reference to a territory. Examples include territorial grant (e.g. in a licence or appointment as distributor or agent), territorial scope (e.g. in a joint venture) and territorial restrictions (e.g. exclusivity commitments).

Contracts affected will include many which relate to the grant of intellectual property (including software, trade mark and patent licences) and corporate transactions (including non-compete undertakings) as well as many commercial contracts.

The key question is whether a reference to the EU, for example as the territory which is covered by the contract, in a contract signed pre-Brexit will be deemed to include or exclude UK with respect to a period after Brexit.

It is unlikely that there will be a blanket statutory "deeming" of the answer to this question covering all contracts for two main reasons. Firstly, references to the EU in legal documents will be too varied to allow this. Secondly, many references will occur in contracts governed by laws which are not the laws of one of the countries which form the UK and so would be beyond the reach of any "deeming" legislation.

There appear to be three possibilities:

- UK remains within the scope of the contract after Brexit;
- after Brexit, UK is excluded from the contract scope; or
- a change to the scope of the EU prevents the contract operating as drafted and so triggers a force majeure remedy.

It is likely that the position under each contract will depend on the drafting of that contract and the applicable rules of interpretation, for example whether or not the contract states that the boundaries of the territory to which it applies are fixed at a certain point in time, such as the signing of the contract.

As contracts are interpreted on their individual merits, there is a risk the different links in a chain of contracts could be interpreted in different ways. For example, a head licence could be deemed to exclude UK and a sub-licence to include it, creating a clear risk for the intermediate licensor.

Similar issues could arise in relation to the treatment of contractual references to existing EU legislation which ceases to have effect on Brexit or is replaced by UK legislation which is not fully aligned with the position at the time the contract was entered into.

Renewal or transfer of contracts

In interpreting any contract which is agreed following a Brexit, the courts will almost inevitably apply the definition of the EU which is relevant at that date.

Any contract which is renewed by agreement between the parties will fall into this category. Similarly, under English law the full obligations under a contract cannot be assigned but can only be transferred by "novation" which is technically the termination and entry into a new contract. This means that where contracts are transferred (for example as part of a business sale) the risks of an unintended consequence will be significantly increased.

An excuse to terminate?

Aside from the specific question of a territorial provision being impossible to construe and so force majeure applying to a contract (see above), there is a broader risk of a party seeking to rely on a "force majeure" or material adverse change ("MAC") clause to terminate a contract.

To take one example, if a business holds the right to distribute product across the EU but, as a result of Brexit, UK ceases to be within the scope of the contract, a party to a contract with that business (including a bank or other finance party) might seek to argue that this triggers a "Material Adverse Change" to the business.

A party who is looking for a reason to trigger termination or an event of default may seek to use this as a technical opportunity to do so.

Change control

Even where there is neither an intractable issue nor a potential termination right, Brexit could potentially require significant changes in the way a contract operates.

The contract may become subject to requirements of new regulation. The implications of change for the parties will be driven by the way in which the contract addresses it.

Issues for occupational pension schemes if the UK leaves the EU

The most likely effects of Brexit on UK occupational pension schemes will be economic – any resulting changes in the value of sterling, inflation, interest rates, property values, a rise or fall in the stock market, and changes in yields on gilts or corporate bonds will feed into funding levels for defined benefit (DB) schemes as well as impacting the size of individual members' "pots" in defined contribution (DC) arrangements.

Many UK statutory requirements on pension scheme governance, and prohibitions of various forms of discrimination, derive from EU law. In theory, if the UK left the EU then this UK legislation could be repealed. However, in practice such changes seem likely to be politically unacceptable and would therefore be very unlikely.

At present, UK pension schemes with active members based in other EU Member States must satisfy certain EU "cross-border" requirements derived from the IORP directive on occupational retirement provision. These requirements can be onerous and have led many employers to take steps to avoid operating a cross-border scheme. With the UK outside the EU, arrangements for cross-border pension provision might need to be dealt with under individual tax treaties between the UK and different Member States. Whether this made offering UK pension provision to staff in other European states more or less attractive would remain to be seen.

Energy markets

Creating a single European energy market is one of the cornerstones of the Commission's consumer agenda and, to this end, on 25 February 2015 the Commission launched its latest initiative "A Framework Strategy for a Resilient Energy Union with a Forward-Looking Climate Change Policy". As may be surmised from the title, this initiative is driving towards a pan-European energy market where Member States are interdependent for energy supplies and where the current 28 national regulatory frameworks are aligned across Europe to allow energy to flow freely across borders.

If the UK were to exit the EU, it is impossible to predict what would happen to the UK's energy markets. Of course the UK is physically connected to the EU via several gas and electricity interconnectors, with several more projects in development, which means it is already part of the EU physical market. Additionally numerous companies currently trade energy on a pan-European basis, allowing hedging of UK energy markets against other markets in Europe.

Whilst the outcome of any exit negotiations is not predictable, it is reasonably certain that the physical links with Europe would remain in place. Any UK company wanting to send power or gas to Europe via an interconnector would be trading with the Member State at the other end of the infrastructure and would therefore need to comply with the then existing EU rules in order to gain access to the market. Given the role that interconnectors play in ensuring security of supply for the UK, it would also seem unlikely that the UK Government would implement any policy that would prevent physical trade with Europe in energy. This again points to UK rules remaining aligned with the then existing EU rules.

It should be noted that the UK's energy policy has developed over a long period of time and, as one of the first European markets to be liberalised, has influenced the development of EU policy. British Gas was unbundled more than twenty years ago when the rest of the EU was still dominated by large vertically integrated utilities, and many of the codes and other regulatory instruments promulgated by the EU in the third energy package draw heavily on the UK experience of market liberalisation. Ceasing to be part of the EU, would impact the UK's ability to influence on-going developments.

Insolvency rules

The likelihood is that, whist domestic insolvency proceedings would continue as before, a Brexit would have a significant impact on cross-border insolvencies involving Europe because of Council Regulation (EC) 1346/2000 on insolvency proceedings, better known as the EC Insolvency Regulation (the "Regulation"). The Regulation sets out certain conflicts of law rules for insolvency proceedings concerning debtors based in the EU that have operations in one or more Member States. Its central premise is that the Member State in which a debtor has its centre of main interests (or COMI) should be the place in which insolvency proceedings relating to that debtor are commenced. While insolvency proceedings can be started in other jurisdictions where the debtor has an "establishment",

these can only be commenced by local creditors and take effect over local assets.

As with all EU Regulations, the Regulation is directly applicable in Member States which have not opted out. If a Brexit occurred, the Regulation would cease to have effect in this country, meaning that we would revert to pre-Regulation conflict positions. As an example, without the Regulation an English company could commence proceedings here but find itself in conflicting insolvency proceedings elsewhere in the EU as there would no longer be the requirement that courts in the EU have to recognise insolvency proceedings commenced in the jurisdiction where the debtor has its COMI as the main proceedings. Although other English cross-border insolvency provisions would remain (including the Cross-Border Insolvency Regulations 2006 which adopts the UNCITRAL Model Law, s.426 Insolvency Act 1986 which relates to co-operation between the English courts and the courts of certain other jurisdictions including Jersey, and the common law recognition rules which have been somewhat curtailed following the decisions in Rubin and Singularis), they would not necessarily assist in the case of multiple insolvencies in Europe. The UNCITRAL Model Law, which provides a suggested framework of legislation that, if implemented, sets out when a country's national courts must recognise insolvency proceedings that have been commenced in a different country, has been adopted by a number of countries but very few in Europe; s.426 only applies to a limited number of countries; and common law will assist with the recognition by the English courts of overseas proceedings, rather than requiring courts in other countries to recognise English proceedings. In many cases we would therefore be reliant on the domestic insolvency laws of the other jurisdiction if an insolvency practitioner appointed under English insolvency proceedings needed to seek the assistance of the courts of that jurisdiction, or to resolve conflicting insolvency proceedings relating to the same debtor.

A Brexit is likely also to raise issues for any company (English or otherwise) seeking to use an English scheme of arrangement to effect a restructuring. The English courts have shown themselves willing to accept that the "sufficient connection" test necessary to allow them to exercise their jurisdiction over an overseas company can be satisfied merely by having an English governing law and jurisdiction clause in the document governing the liabilities to be schemed. Schemes of arrangement are not "insolvency processes" under the Insolvency Regulation, and so a company does not have to move its COMI to England to use the scheme process. There has been a significant increase in the use of schemes both by English and overseas companies as they allow minority secured creditors to be "crammed down" and bound by a restructuring which, had it been done under the terms of the relevant Facilities Agreement, would have required unanimous creditor consent. However, the Courts are unwilling to exercise their jurisdiction unless the scheme is likely to be given effect in all relevant jurisdictions (so, for example, if a Dutch company went through an English scheme, the Court would want expert evidence that the scheme would be recognised in the Netherlands as well as England). As well as obtaining expert evidence on this point at the sanction hearing, the Court in recent cases has also placed reliance on the fact a scheme is likely to be recognised automatically across EU Member States as a "judgment" within the meaning of EU Regulation 44/2001 on Jurisdiction and Recognition of Enforcement of Judgments in Civil and Commercial Matters (the "Judgments Regulation"). If a Brexit were to occur, this automatic recognition would be lost, making the English scheme process potentially less attractive to European companies.

Aviation

The impact of a Brexit on the aviation sector will be significant because EU policy has been designed to create a single European sky, with harmonised legislation from air traffic control to safety policies. A Brexit will require important transitional agreements or the UK's aviation sector will be adversely affected in numerous ways, including:

- lack of access to European airspace and reduced flow of traffic into UK airspace because the Single European Sky framework will no longer be in effect;
- reduced slot coordination with other EU airlines and an inability to predict slots that UK-owned or managed airlines will have in EU countries; and
- reduced inter-agency cooperation between UK institutions, such as the Civil Aviation Authority, and EU agencies, such as the European Aviation Safety Agency.

Scotland referendum
It is not known whether the views of voters in Scotland on a potential Brexit would diverge from voters in the rest of the UK but the SNP has indicated that if they did it would regard a vote to leave the EU as a justification for seeking a second referendum on Scotland leaving the UK. The potential issues associated with that were covered in a previous note by the Constitutional Change Taskforce (http://maps.hoganlovells.com/scottish-referendum).

International Trade Agreements
On Brexit occurring, the UK will cease to have the benefit of the free trade agreements which are in place through the EU - and those which are currently being negotiated. The implications of the loss of those FTAs for a business will vary depending on the sector and markets it operates in. The UK will seek to negotiate replacement arrangements and we can advise on the implications of the loss of existing arrangements and the terms of any replacement arrangements being negotiated.

How Hogan Lovells can help
Businesses and public bodies should identify which existing key contracts or business areas could be affected and develop a response strategy. They should also re-examine contracts moving forward to ensure new contracts (including contract renewals or extensions) do not reinforce problems.

Hogan Lovells have extensive experience of analysing and addressing the impact of significant change on businesses and on contracts and transformational changes in regulation.

Hogan Lovells can help clients to evaluate the full range of legal implications for a particular business, review material contracts, conduct a contract or legal issue audit and assist with developing a strategy for responding to potential issues identified. We can also provide tools to help clients to manage audit, assess and manage risks themselves.

Hogan Lovells is the only firm top ranked for both Administrative & Public Law and for Parliamentary & Public Affairs by Chambers UK 2016 and has a team of experts who can advise clients on their options for engaging and influencing the legislative process associated with a Brexit transition.

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Implications for corporates

The UK's equity capital markets will no longer be subject to EU legislation, although certain domestic regulation will be a legacy of the 'previous' EU regime. The Government is unlikely to significantly change its existing capital markets regime – but we expect that it will review its regulation and consider streamlining it to remove defunct provisions or unnecessary 'red-tape' laws. M&A is less likely to be directly affected by a Brexit than equity capital markets work as it is subject to a lot less EU derived law and regulation. However, we would expect that the Takeover Code would continue in place in the event of a Brexit, subject to minor amends to reflect the Brexit and to ensure that the UK remains competitive.

In relation to cross-border capital markets and M&A activity, the UK will be free to create laws and protections which attract non-UK companies and investors to the UK. It will be subject to negotiation as to whether EU Member States will adopt a reciprocal approach towards UK companies and investors. The Government will need to consider and provide for the company form, the 'Societas Europaea' or 'SE', a European public limited company, which can be incorporated in any Member State.

Equity capital markets

In the event of Brexit, the UK's equity capital markets will no longer be subject to EU legislation, although certain domestic regulation will be a legacy of the 'previous' EU regime. It seems unlikely that the Government will significantly change its existing capital markets regime as a result of Brexit. Rather, it is likely to review its capital markets regulation, some of which was enacted in order to implement EU directives (for example, the Disclosure and Transparency Rules which implement the disclosure requirements of listed issuers set out in the EU Transparency Directive) and may consider streamlining its regulation to remove defunct provisions or unnecessary 'red-tape' laws which it was previously obliged to implement. The Government will want to strike a balance between exercising its freedom to legislate for the equity markets and maintaining the UK's position as an attractive listing destination for issuers.

Consequently, we would expect the Government to closely monitor European legal and regulatory developments to ensure that the UK remains a globally competitive market.

The Government will want to ensure that the ability to conduct cross-border capital markets transactions is not significantly prejudiced by a Brexit. Whilst it will be free to create laws and protections which attract non-UK issuers and investors to the UK, it will be subject to negotiation as to whether EU Member States will adopt a reciprocal approach. For example, the EU Prospectus Directive established a passporting facility for prospectuses so that issuers of shares can use a prospectus approved in their own jurisdiction for public offers of their shares in other EU Member States. In the event of a Brexit, the UK would not be able to avail itself of this facility. However, we expect that the UK is likely to approve prospectuses prepared in accordance with the EU regime, upon which the existing UK regime is based (and assuming that no significant changes are made to the UK regime post Brexit). Similarly, it is hoped that the EU Member States will adopt the same approach in relation to UK prospectuses.

M&A

M&A is less likely to be directly affected by a Brexit than equity capital markets work as it is subject to a lot less EU derived law and regulation. Public M&A is governed by the Takeover Code and, although this gives effect to the EU Takeovers Directive, it existed in substantially its present form prior to the implementation of that Directive and has governed UK takeovers for over 40 years. We would, therefore, consider that the Takeover Code would continue in place in the event of a Brexit, subject to minor amends to reflect the Brexit. As with ECM work, we would expect that the Government (and the Takeover Panel) would monitor European developments and may possibly amend the UK framework to ensure that we remain competitive. As it is generally felt, however, that the UK Code formed much of the basis of the European Takeovers Directive and that UK has been a pioneer of takeover regulation, we would foresee that we would continue to proactively develop UK takeovers regulation. Private M&A is much more lightly regulated than public. However, one area of possible impact is that of cross-border mergers.

In the UK, the cross-border merger regulations were implemented as a result of the EU cross-border Directive and provide for mergers between companies incorporated in any EEA state. Whilst the UK may be happy to continue with legislation that allows UK companies to merge with EEA companies after a Brexit, it would remain to be seen whether the EEA states would reciprocate that arrangement – without specific action on their part it would be likely that UK companies would no longer be able to avail themselves of the current cross-border merger regime.

Potential for greater political interference in UK merger control

Currently, the EU merger control framework acts as a constraint upon political interference in merger control decisions. The European Commission reviews transactions solely on a competition-based test – whether the transaction will "significantly impede effective competition" in the EU. There are only limited exceptions under which EU Member States may intervene to take measures to protect specified "legitimate interests" – public security, media plurality, and financial prudential rules. This system serves to protect against political interference. With the loss of this system as a constraint on the UK following Brexit, there is a risk that UK merger control may in the future become more politicised. This could have an impact on deal clearance certainty, and necessitate the use of political avenues for seeking clearance of transactions which raise competition law issues.

Corporate entities

As a result of EU legislation it has been possible to form a European public limited company, a Societas Europaea or SE, in any Member State. Whilst these entities are European, they have their registered office in the country of incorporation. There are approximately only 40 SE's with their registered office in the UK, but in the event of a Brexit, it would seem likely that there would need to be provision for these entities to convert into a UK company or for them to restructure themselves so that their registered office moves to an EEA Member State.

How Hogan Lovells can help

In the event of Brexit, our experts will closely monitor the legal and regulatory developments concerning general corporate matters and will work with you to structure and implement your transactions in order to achieve the most successful outcome for your business.

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Implications for commercial law

Brexit would not simply raise questions about the drafting and effect of many contracts which have been prepared on the assumption of the UK forming part of the EU. It would also call into question many of the legal parameters within which businesses have become used to undertaking their commercial activities. Potential areas of change include the ability to deploy staff flexibly across the EU, the application of TUPE to outsourcing and other major contracts, statutory compensation enjoyed by commercial agents, the ability to move data between different European operations and restrictions on the ability to grant territorial exclusivity. Most fundamentally, Brexit would inevitably have an impact on significant features of the single market. As a minimum there is likely to be a slow divergence of currently common standards and specifications. More significant change could see the emergence of some tariff or non-tariff barriers.

Here we analyse some of the specific ways in which those general issues will impact on the commercial activities of businesses.

Some key commercial changes

- **De-Harmonisation of Trading Rules**
  The UK currently benefits from the "four freedoms" of the EU's single market due to the harmonising effect of EU law across the EU:
  - the elimination of tariffs on goods;
  - freedom to sell goods and services in the EU;
  - harmonised export rules;
  - harmonised minimum regulatory standards and product standards, and key trading rules across the EU, particularly in respect of competition law, consumer law, product standards and commercial practices, are currently harmonised as a result of their compliance with EU law.

The EU creates minimum regulatory standards and Member States must allow goods that comply with those standards to be sold unhindered across the EU. Product regulations are also harmonised, allowing exporters to comply with one harmonised set of rules rather than make distinct products which comply with differing national rules.

However, businesses which trade only with the UK and other non-EU countries may benefit from the removal of EU regulation and standards, which can be seen as a burden.

Depending on how much EU law the UK decides to retain and/or mirror in its domestic legislation post-Brexit, businesses that wish to trade between the UK and rEU may find that they have to comply with two, potentially very different, legal systems, losing the benefit of only having to comply with harmonised EU trading law and product standards.

This will be particularly significant for online traders of consumer goods who wish to deal with consumers in rEU post-Brexit. For example, if UK law does not mirror EU law post-Brexit such traders may potentially have to have two versions of each product line, i.e. rEU-compliant and UK-compliant.

- **Reduced Freedom of Movement**
  Freedom of movement allows multi-national employers to freely move employees between operations across the EU. It is unclear how this principle would apply if there was a Brexit. It is certainly possible that at some stage staff may need to be relocated to and from the UK if workers no longer have the right to work freely across the EU, and/or the replacement of such employees in rEU if the role or function cannot easily be transferred to the UK.

  This could have significant impacts on multi-national employers and may necessitate significant adjustments to their supply chains.

- **Workers no longer follow activities**
  At the moment, if a business activity transfers from one party to another, the transferee has to take on existing staff of the transferor on their existing terms and conditions following a business transfer. Even if the "automatic transfer" principle were to be retained, it is likely that it would become easier to change terms and conditions of employment after a transfer.

  When TUPE has been reformed in the UK it has been recognised that it would be helpful to allow more flexibility for post-transfer harmonisation of terms and conditions, but that this was very difficult to achieve in light of existing ECJ case law.

TUPE could be abandoned or fundamentally reformed following a Brexit.

- **Changes to Competition Law**
  Brexit would remove the requirements that UK competition law align with that in the EU.

  It is impossible to know how UK competition law would react. Many of the principles currently reflected in EU law would be likely to survive in some way but there could be significant change. Specifically the change would end the outlawing for many agreements of absolute territorial exclusivity which has the effect of restricting trade between the UK and the EU.

- **Reduced protection for Agents**
  EU law currently provides statutory protection for certain categories of sales agent. Importantly, that protection creates a regime of statutory protection on termination of an agency agreement in the form of compensation or indemnity. This can potentially expose a principal to significant additional costs if terminating an agency relationship, even where that is permitted by the terms of the contract.

  These rules are currently implemented in the UK through the Commercial Agents (Council Directive) Regulations. There is a distinct possibility that Brexit would result in these EU driven protections being removed so reducing potential costs for principals but exposing agents to risks that will not have been anticipated when signing a contract under the current law.

- **Changes to the rules on data**
  Brexit would take the UK outside the direct effect of EU laws on privacy and data protection.

  Whilst it is likely that many of the current protections for individuals would remain, there is much greater uncertainty regarding the treatment of data and ability to move that data across the border between the UK and rEU. It is by no means clear that arrangements under which data currently is collected in the UK and processed in Germany (or vice versa) could continue unchanged.

- **Tariffs or differential VAT treatments**
  Brexit would remove many of the current constraints on the UK which have the effect of creating an EU "free trade zone" with broadly consistent VAT regimes.

  The precise outcome is impossible to predict but it is at least possible that in some areas the result may be the appearance of some form of fiscal barrier or differential treatment result in direct additional costs to move products or services between the UK and rEU.

Some commercial implications

We have outlined here just a few of the practical implications of these changes for commercial arrangements.

sales and distribution:

- if differences emerge between the UK and rEU in the standards and requirements for products or services, this will require changes to models which apply a common approach to pan-European sales;
- if competition law and rules applicable to commercial agents change materially, this will result in changes of business practice in terms of the structure of arrangements and the ease with which they can be changed;
- if existing contracts are drafted in a way which assumes the existence of an EU containing the UK, they may simply not function adequately in the face of a Brexit;
- if direct barriers to trade (tariff or non-tariff based) emerge these could make existing arrangements impossible to operate; and
- if privacy rules change, business models which assume a single process to collect, pool and process data from sales across the EU or which operate on the basis of pan-EU marketing activity may need to be fundamentally changed.

supply chain and procurement:

- if differences emerge between the UK and rEU in the standards and requirements for products this will require adjustments to contract which are currently based on a single pan-European specification;
- if direct barriers to trade (tariff or non-tariff based) emerge these could make existing arrangements impossible or economic to operate;
- if free movement of labour is restricted this could result in a mismatch between the costing assumptions on which contracts are based and the real cost of labour (e.g. if a factory can no longer draw on relatively low cost labour from less developed parts of the EU); and
- when dealing with the public sector or utilities, it is possible that there could be significant change to the current statutory procurement rules.

outsourcing:

- if current TUPE legislation changes materially, there may be fundamental changes to basic assumptions regarding employment costs on start-up and termination on which many outsourcings are based;
- if free movement of labour is restricted this could make it difficult to fulfil the requirements of an outsourcing (given the difficulty of locating the right labour force in the ideal location) and/or to maintain costing assumptions where these assume access to relatively low cost labour;
- if regulatory coordination and harmonisation were to be reduced, this could potentially create challenges for outsourcings which contemplate an approach which meets requirements for several Member States; and
- if privacy rules change, outsourcings which handle data from activities undertaken across the EU (e.g. single pan-European contact or processing centres) may need to be fundamentally changed.

joint ventures:

- business models which are based on the concept of a single market involving the UK within the EU will need to be revised and existing joint venture governance documentation may be unworkable;
- restrictions or exclusivity commitments designed to maintain the stability of the joint venture may no longer operate as intended (or at all) and may no longer be effective to provide that stability; and
- accounting principles applied for the purpose of calculating profits and losses may no longer be fit for purpose if differential treatments or cross-border costs emerge between the UK and rEU.

How Hogan Lovells can help

With a dedicated global commercial team with a deep familiarity with the way businesses work and with experts in many regulated industries and specialist areas Hogan Lovells can diagnose and solve the challenges posed for your business by a potential Brexit.

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Implications for regulation of financial services

Brexit will have a significant impact on financial institutions in both the UK and rEU.

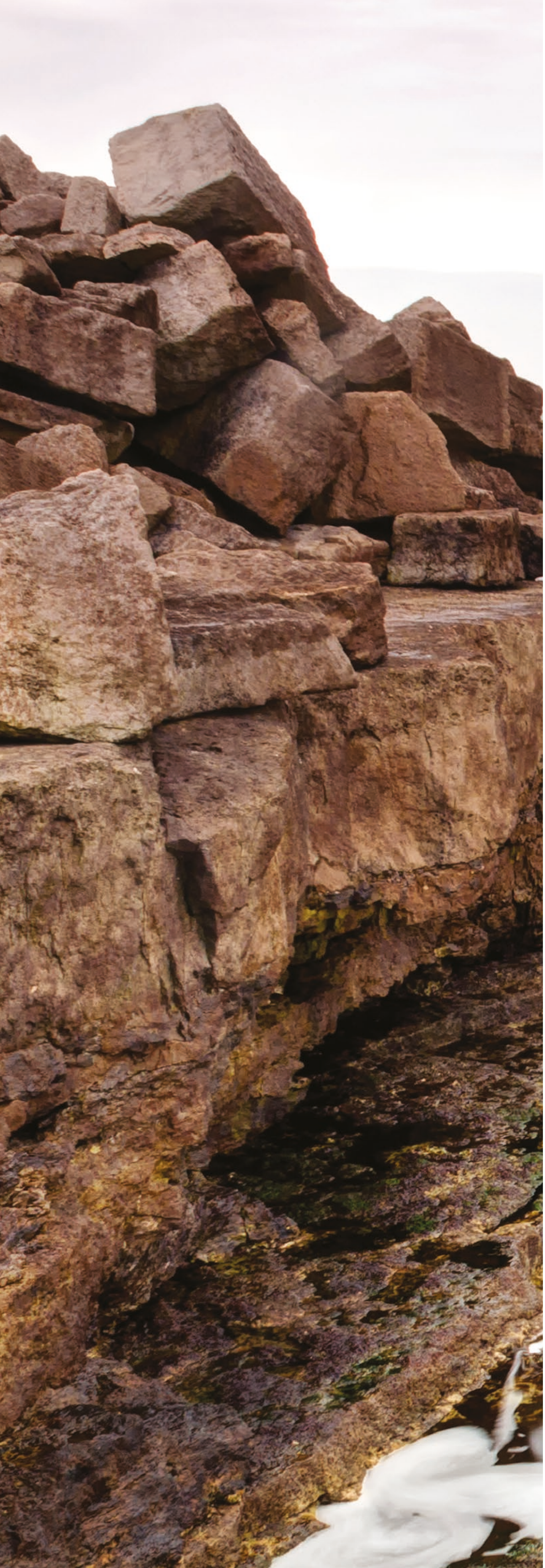
- The extent of the impact will largely depend on the nature of the arrangements that are put in place between the UK and rEU to govern how institutions in each jurisdiction will continue to access markets on a cross-border basis. It will also depend on the extent to which the UK continues to apply law that is based on EU financial services legislation
- In the event that the cross-border passporting regimes are lost, financial institutions in the UK and rEU may need to consider establishing new regulated entities on each side of the "EU border"
- Similar issues will be faced by banks, investment firms, insurers and intermediaries that currently operate on the basis of EU regulations or laws implementing EU directives
- It will also be important to the UK capital markets for UK market infrastructure to benefit from the continuation of arrangements that facilitate cross-border access by firms based elsewhere in the EU
- Firms providing investment services, financial products or funds will need to take account of the impact of Brexit on investment mandates and product terms and product marketing arrangements.

Potential impacts of Brexit
If the result of the Referendum on the UK's membership of the EU is that the UK votes to leave, any financial institution with operations which cross an EU/UK border will need to consider the potential impact on its business of having to operate in a new legal and regulatory regime. Given the extent to which EU law is embedded in the regulation of financial services in the UK, a Brexit would also impact on existing UK regulations as the UK takes measures to replicate or diverge from the current EU law requirements. Recent events, such as the UK Government / European Central Bank court battle over proposed requirements for EURO trading clearing houses to be located within the Eurozone, demonstrate the potential for detrimental impact on the UK's financial services industry where the UK is unable to influence new measures and initiatives affecting financial institutions wishing to conduct business in the EU.

The precise impacts of a Brexit will depend on the timing and outcome of negotiations between rEU and the UK, and also on the future structure of the UK's relationships with the rest of the world: for example, of key relevance will be whether the UK will be included in the European Economic Area and benefit from the arrangements in the EU that facilitate the cross-border provision of financial services between EEA Member States.

Nature of the UK Regulatory regime
It is important to understand the structure and basis on which the financial services sector in the UK would continue to be regulated:

- Given that the Financial Conduct Authority (FCA) and Prudential Regulation Authority (PRA) are national regulators, there is no reason to believe that they could not continue to perform their functions, as they are currently defined
- To an increasing extent, UK financial services regulation is driven by EU law. Much of the UK's financial services law and regulation is derived from laws which apply across the EU. In the event of a Brexit, the UK Government would need to choose to what extent the existing laws that have been incorporated into UK law should be retained, and to what extent the UK should adopt laws that diverge from EU law
- Where EU law has been made by way of directive, there will be implementing legislation in the UK that could continue to apply, subject to any amendments that may be necessary to acknowledge that the UK is no longer part of a wider EU legal or regulatory structure. Alternatively, the UK could diverge from the requirements of the relevant directive by amending that legislation
- However, much recent financial services law has been made by way of EU Regulation, which does not require implementing measures in order to be effective domestically (for example, the recent Capital Requirements Regulation, European Market Infrastructure Regulation, Market Abuse Regulation and the Markets in Financial Instruments Regulation, which supplements the MiFID II Directive). If the UK ceases to be a member of the EU, and if it wishes to implement provisions equivalent to those in these Regulations, it would need to pass domestic



legislation incorporating those Regulations into law across the UK, subject to such amendments as may be necessary to reflect the fact that the UK is not a member of the EU (such as, for example, the dis-application of any provisions providing rights for cross-border provision of services; or provisions specifying powers for EU-level bodies such as the European Banking Authority, the European Securities and Markets Authority and the European Insurance and Occupational Pensions Authority)

- EU directives and regulations establish the prudential requirements to be met by most of the financial institutions in the UK. Consequently, the basis on which UK regulators determine what financial resources UK financial institutions must maintain is the same as that applied by other EU regulators for equivalent types of institution. The UK regulators would therefore need to determine to what extent UK financial institutions should continue to be subject to common prudential requirements as are other rEU entities.

Cross-border activity

Ability of UK financial institutions to access the rEU

It will be necessary to determine the basis on which UK financial institutions will be able to offer their services into rEU (and vice versa).

- A cross-border regime could potentially operate on a similar basis to the current EU regimes for "passporting" by financial institutions, which facilitates the provision of services, or the maintenance of branches, on the other side of their respective border without triggering a requirement for direct regulatory authorisation in those jurisdictions
- Alternatively, there may be some form of transitional "grandfathering" arrangement, under which cross-border arrangements that were in place prior to the Effective Date would remain permissible following the Effective Date (even if only until a more formalised regime is established)
- In the absence of any such cross-border regime, financial institutions may need to obtain advice on the legal and regulatory 'perimeter' in each EU state in which a financial institution wishes to perform (or continue to perform) business in order to identify what activities would trigger a local authorisation

requirement and either modifying those activities to avoid triggering the requirement, or obtaining local authorisation in each relevant EU state

- UK institutions could consider conducting cross-border business only from subsidiaries incorporated in an rEU state directly authorised by a rEU regulator which could provide services into the remainder of the rEU using EU passports, and, if it fits its commercial objectives, then establishing back-to-back arrangements between those rEU entities and the UK entity to ensure that the economic benefit and liabilities are passed back to the UK entity. This would be similar to the approach taken to other non-EU financial institutions that currently operate branches in the UK under a direct UK authorisation.

Ability of rEU financial institutions to access the UK

EU financial institutions would also need to consider how they will continue to conduct business in the UK. If they are unable to benefit from passporting arrangements into the UK, then in order to continue to provide services to the UK market, they may need to establish arrangements in the UK that are directly authorised by the UK regulators.

Implications for non-EU financial institutions

The passporting regimes under various EU directives enables financial institutions incorporated and authorised in an EU Member State to offer their services into, or establish branches in, other EU Member States, without requiring separate regulatory authorisations or licenses in those Member States. For example, there are passporting regimes for banks, firms providing investment services, insurers and insurance intermediaries.

Many non-EU financial institutions have established regulated subsidiaries in the UK on the basis that these passporting regimes will enable them to access the markets of other EU jurisdictions. If the UK were to cease to benefit from these EU passporting regimes, non-EU owners of UK-authorised financial institutions could consider that it would be preferable to move their main European regulated operations to a jurisdiction within rEU, in order that they can continue to benefit from the passporting regimes.

Whether this is likely will depend on a range of factors, which will differ on a case-by-case basis for each institution, such as:

- The relative importance to such organisations of the UK market, compared to the wider EU market, and whether it is sensible for the firm to retain a regulated presence in the UK, together with an EU regulated entity;
- Whether the UK agrees with rEU cross-border arrangements which allow firms to continue to benefit from the existing passporting regimes or substantially similar arrangements.

Impact on market infrastructure

Regulated markets and central counterparties (CCPs) in the EU currently benefit from a regulatory structure that facilitates cross-border access to such market infrastructure. Under the Markets in Financial Instruments Directive, Member States are required to permit investment firms from other Member States to access regulated markets, central counterparties and clearing and settlement systems established in their territory. Member states are also restricted from imposing unnecessary requirements on investment firms that exercise their rights to access regulated markets in other EU Member States. Under the European Market Infrastructure Regulation (EMIR), CCPs authorised in any EU jurisdiction are treated as authorised throughout the EU.

If these arrangements are no longer available following Brexit, it will be important to determine the basis on which financial institutions based in rEU may continue to access UK regulated markets and CCPs. For example, unless some form of grandfathering arrangements established, UK CCPs will are likely to be treated as "third country CCPs" under EMIR and will need to apply for "recognition" under EMIR in order to continue to be able to offer their services to financial institutions based in the EU.

The financial market infrastructure is of critical importance to the operation of the UK capital markets. It will therefore likely be a high priority of the UK Government to establish Hogan Lovells arrangements that preserve the ability of rEU firms to continue to access UK regulated markets and CCPs.

Cross-border insurance transfers

If the UK left the EEA, an insurer would no longer be able to use the existing EU-wide regimes to transfer insurance business to either its own branches or subsidiaries located in other Member States or to other EU insurers. Therefore, the ability of insurers to make these transfers will become severely hampered.

Under existing UK legislation derived from the Insurance Directives, insurers (including reinsurers) must use a court-approved process to transfer business within the EEA and likewise EEA insurers can transfer business into the UK using a similar process provided for in their home state legislation. If the UK is outside the EEA then Member States will no longer be required to allow a transfer of business from the UK.

In the absence of replacement arrangements being agreed, the UK would be in the position of non-EEA members and would have to apply to the Court in the Member State from which it is transferring business. In the case where an insurer was seeking to transfer business from branches in several different EU countries the need to make multiple Court applications in different jurisdictions will significantly increase the time, cost and complexity of the transfers.

Impact on commercial agreements of financial institutions

It will be necessary for financial institutions in both the UK and rEU to consider to what extent material commercial contracts may be affected by Brexit. For example:

- Provisions in outsourcing and distribution agreements that impose obligations on parties to meet the costs of complying with applicable law and regulation, or to implement changes to systems or processes as a consequence of regulatory change, will need to be reviewed to determine to what extent they cover any changes that may be required due to regulatory changes or having differing legal and regulatory requirements between UK and rEU operations; and
- Distribution agreements may need to be reviewed where they currently provide for the distribution of financial services products in both UK and other parts of the rEU, in order to assess whether the potential separation of the regulatory regimes may impact on their terms.

Investment Firms, products and funds

Depending on the exact terms of a Brexit (and assuming that the UK would not remain in the EEA) it is likely that the impact on UK fund managers will be significant. As much of the relevant regulation is based on international initiatives, Brexit would not necessarily mean that managers will be more lightly regulated. Also we don't know to what extent (and when) UK implementing legislation, for example in relation to the Alternative Investment Fund Managers Directive (AIFMD) and the Undertakings for Collective Investment in Transferable Securities (UCITS) Directive, will be repealed. This means that although the compliance burden at least initially will remain unchanged for UK fund managers, the benefits of the EU based regulation in the form of marketing and management passports (which allow UK fund managers to market to investors based in rEU and provide services to entities in rEU) are likely to disappear.

Also, several fund vehicles such as UCITS and European Long Term Investment Funds (ELTIFs) must be EU domiciled and managed by an EU-based manager, which would prevent UK domiciles and managers for such funds unless these are re-negotiated with the EU.

Impact on Alternative investment fund managers

Depending on exit terms, post Brexit, UK alternative investment fund managers (AIFMs) would be treated as non EEA AIFMs and would only be able to market alternative investment funds (AIFs, i.e. broadly non-UCITS funds) to EEA investors under private placement arrangements if the member states where the investors are based permit such marketing. Under the AIFMD, a non EU passport may be introduced. This would allow non EEA domiciled and managed funds to be marketed within the EEA if the manager is authorised and certain other conditions are met. However, at present, the introduction (and timing) of such a non EU passport is not certain.

Impact on UCITS funds and managers based in the UK

A Brexit would fundamentally impact UK domiciled UCITS as these would need to be EU domiciled and self-managed or managed by an EU management company (ManCo). As the precise terms of a Brexit are uncertain we cannot yet fully whether the UK will be permitted to remain a domicile for UCITS or ManCos. If this would not be the case, current UK UCITS or ManCos will have to be migrated/relocated to an EU Member State (and re-authorised) or cease being a UCITS.

Impact on investment mandates/investment products that specify the UK as a single investable area.

Mandates in Investment Management Agreements and investment policies in fund documentation, plus retail investment products, will likely need to be amended to allow for investment in rEU and UK (instead of the EU). This will require consideration of the relevant variation terms and is likely to require agreement of the investors as well as regulatory notifications.

Investors will have to review their internal procedures and investment guidelines to accommodate investment in rEU and UK. For example, pension fund trustees may have to amend their Statements of Investment Principles.

Impact on current investors resident in rEU

Existing funds and investment products would need to distinguish between investors resident in rEU and UK to allow for separate rEU and UK product offerings. As set out above, UCITS funds may need to be radically restructured.

How Hogan Lovells can help

Now that the UK has committed to holding a Referendum on Brexit, clients will need to evaluate the potential impact of Brexit on their businesses and how their businesses would be best structured to ensure that they are most ideally positioned to deal with those impacts. This will enable clients to inform and influence the debate prior to the Referendum as well as assess the requirement for contingency planning. Hogan Lovells' Financial Institutions Group is well placed to assist its clients across the EU, and globally, to identify and implement the most appropriate measures to take. We have relationships with financial service regulators across the EU and we can provide comparative analysis on the merits, legal and practical, of EU regulatory regimes. Our team advises all types of financial institutions on all aspects of financial services regulation. Examples of the types of work that we typically perform for our clients include the following:

- Corporate re-structuring and re-organisations;
- Establishment of new regulated entities or branches, and applications for regulatory permissions;
- Advice on regulatory processes, such as the EU "passporting" processes;
- Advice on compliance with PRA and FCA regulatory requirements, including in relation to governance, systems and controls and conduct of business matters;
- Establishment of new outsourcing agreements or the review and amendment of existing outsourcing arrangements (whether intra-group or third party);
- Review and amendments to distribution agreements and / or compliance processes for the approval and distribution of financial products;
- Business transfers, including insurance or banking business transfers.

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Implications for litigation

Legal uncertainties created by Brexit may give rise to increased litigation

- EU rules on conflicts of laws may cease to apply in the UK, which would give UK courts more flexibility but also create uncertainty as to where and how cross-border cases should be tried.
- It would become more difficult to serve UK proceedings on defendants in the remaining EU Member States, and to enforce UK judgments there
- Decisions of the CJEU would not be binding in the UK.

Litigating uncertainties

The UK's exit from the EU may create legal uncertainties which in turn could lead to an increased volume of litigation. For example, clauses in private contracts could become ambiguous when read in the context of an EU which did not include the UK. Indeed, a party could find itself unwittingly in breach of contract where the re-drawing of the EU boundary meant it no longer had the right to conduct activities in the UK under an EU licence. Transitional arrangements would need to be put in place to mitigate the foreseeable effects of the UK's exit – but these may themselves be open to challenge.

Conflicts of laws – impact on existing rules

At present, courts in the three jurisdictions that make up the UK decide whether or not to accept jurisdiction over a dispute largely by reference to the body of EU rules known as the 'Brussels Regime'. This is set out principally in the Recast Brussels Regulation (EU 1215/2012).

If the UK severs ties with the EU, courts in the UK would no longer be bound to apply the Brussels Regime when deciding issues of jurisdiction. However, if it continues in loose association with the EU, either by joining the European Free Trade Area (EFTA) or by negotiating some special status, the Brussels Regime may still apply in the UK in a modified form. This could happen, for example, by the UK signing the Lugano Convention 2007, which currently extends a version of the Brussels Regime to most EFTA Member States.

Whatever the UK's bilateral arrangements with the EU/EFTA and individual Member States, it would be expected to sign up to the Hague Convention on Choice of Court Agreements (the 'Hague Convention'), which the EU has already signed and ratified and which governs jurisdiction issues as between it and other Convention States. This provides an additional or alternative framework for deciding cross-border jurisdiction questions at the European and global level.

Following its departure from the EU, it is less likely that the UK would continue to be subject to EU rules on the substantive law governing contracts and disputes, since there is at present no direct equivalent in this area to the Lugano Convention. However, for the sake of continuity, a means might be found by which the UK could continue to be subject to the main (if not all) EU rules on governing law embodied in the Rome I and Rome II Regulations, which determine the law applicable to contractual and non-contractual obligations respectively (EC 593/2008 and EC 864/2007).

Conflicts of law – key implications

If the UK is no longer subject to the Brussels Regime, the Rome Regulations and the Service Regulation (EC 1393/2997):

- Courts will have more opportunities to exercise their discretion, and do so more widely, when deciding whether or not to accept jurisdiction to try a case. This may result in a larger number of decisions on jurisdiction that are more just and practical in individual cases, and to more disputes being tried in England and Wales in particular, but the price of this would be a greater uncertainty as to what decisions courts are likely to make
- Jurisdiction agreements favouring courts in the UK will not have the force they do now in courts throughout the EU, in particular when proceedings are already underway in an EU Member State
- It will be more difficult to serve UK proceedings on defendants domiciled in the EU, and to enforce UK judgments there. This will increase the cost and time involved in commencing and following through some cross-border litigation.

There is general uncertainty as to whether EU rules regarding the law that governs a contract or dispute would continue to be applied (strictly or in modified form) in the UK.

CJEU decisions

Another consideration would be how decisions of the Court of Justice of the European Union (CJEU) would be treated post-Brexit. UK courts interpret and apply EU-derived laws in accordance with CJEU rulings, and a lot of UK case law, and indeed, legal doctrines (in particular in the field of employment law), have evolved on this basis. This raises two questions:

- First, would UK courts still be bound by the UK case law that has built up in this way, or would they now have a bona fide reason to distinguish and depart from these CJEU-based UK decisions and forge their own path?
- Secondly, looking forward, would UK courts no longer need to be bound by CJEU decisions?

It seems unlikely that UK courts would depart substantially from the CJEU "line", either in terms of established case law and doctrines, or in terms of future case law. CJEU decisions are therefore likely to be persuasive, although not direct and binding authority. Certainly, it seems likely that the UK would want to retain a degree of legal consistency with the EU, at any rate in relation to doctrines, not least because it will remain an important trading partner, and it would be necessary if the UK is to enter into trade agreements with the EU (for example, by joining the European Economic Area or negotiating bilateral agreements with it).

How Hogan Lovells can help

We have a market-leading global litigation team who, as well has handling high-value, complex disputes in a wide range of practice areas, is also experienced in advising clients on risk management and "pre-litigation" situations. We can assist clients in identifying areas of their business which might be affected by a Brexit and advise them on mitigating any impact or pre-emptying any possible adverse effect. In the event of a Brexit, we can assist clients in navigating the uncertainty in order to protect their businesses.

In addition, the key to controlling the forum in which any dispute is tried, and the law applied in the proceedings, is including robust and carefully drafted dispute resolution clauses in commercial agreements. Hogan Lovells has considerable expertise in drafting dispute resolution clauses, including advising on the desirability of entering into an arbitration agreement or providing in the clause for other forms of alternative dispute resolution.

Through its global network of offices, Hogan Lovells is well placed to tackle the procedural hurdles of service of proceedings and the enforcement of judgments across borders. We also advise on the respective merits of different jurisdictions and tactical questions regarding where it is best to litigate, and when.

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Implications for competition law

Assuming that UK competition law is not completely changed, and continues to apply as it does today, we can expect the following key consequences of Brexit for business:

- Certain transactions will no longer benefit within the EU from a "one-stop-shop" merger control review by the European Commission, and instead require review under two separate regimes by both the European Commission and the UK's Competition and Markets Authority ("CMA"). Certain cartel and abuse of dominance cases will also require business to deal with the two authorities, rather than just the European Commission
- There may be greater scope for political intervention in UK merger control
- The UK government will have greater flexibility to provide State aid to UK business, but the UK government and companies will have less ability to complain about State aid that is granted to competitors by an EU Member State
- A different competition law framework will apply to distribution arrangements
- The CMA's resources for enforcing competition law will be at full stretch, since enforcement of competition law in non-regulated sectors will be carried out only by the CMA, rather than under the current situation where the burden is shared by both the CMA and the European Commission
- Advice from UK qualified solicitors will no longer enjoy legal professional privilege for the purposes of EU competition proceedings.

The consequences could be considerably greater if the UK were to decide, following Brexit, to re-write its competition law, which is currently similar to EU competition law.

The key issues

An additional regulatory layer

Certain transactions will no longer benefit from the "one-stop shop" review system for mergers under the EU Merger Regulation. Under this system, transactions that fulfil certain turnover thresholds ("concentrations" with "Union dimension") can be notified to the European Commission for clearance in the whole of the EU without the need to make separate filings to the various national competition authorities in the EU. Following Brexit, certain transactions may require review by both the European Commission and the UK's Competition and Markets Authority ("CMA"). This will involve additional regulatory uncertainty and extra cost for business in dealing with concurrent merger reviews.

The same extra regulatory layer will be added to certain cartel and abuse of dominance cases. Defendants and complainants may in these cases have to deal with both the UK and EU authorities, rather than just the EU. This could lead to outcome uncertainty and extra cost.

Potential for greater political interference in UK merger control

Currently, the EU merger control framework acts as a constraint upon political interference in merger control decisions. The European Commission reviews transactions solely on a competition-based test – whether the transaction will "significantly impede effective competition" in the EU. There are only limited exceptions under which EU Member States may intervene to take measures to protect specified "legitimate interests" – public security, media plurality, and financial prudential rules. This system serves to protect against political interference. With the loss of this system as a constraint on the UK following Brexit, there is a risk that UK merger control may in the future become more politicised. This could have an impact on deal clearance certainty, and necessitate the use of political avenues for seeking clearance of transactions which raise competition law issues.

State aid "up for grabs"

The EU has a developed and sophisticated framework for regulating State aid in the EU, including within the UK. Following Brexit, the UK government would have greater flexibility to support UK business, but the UK government and companies would have less ability to complain about any State aid that is granted to competitors by other EU Member States. The UK's flexibility to offer such state aid may in practice be circumscribed by the terms of any trade agreement which it negotiates with the EU.

A different competition law framework for distribution arrangements

With the objective of promoting the EU's single market objectives, EU competition law prohibits suppliers from granting their distributors "absolute territorial protection" within their contract territory (under which distributors are protected from competing sales – whether active or passive – within their contract territory by distributors established in other territories). Following Brexit, agreements granting absolute territorial protection will no longer be automatically prohibited, although they will still require careful case-by-case analysis to check that they do not lead to an appreciable restriction of competition. Business will need to devise appropriate strategies around this new regulatory environment for distribution arrangements.

CMA resources at full stretch

Following Brexit, enforcement of competition law in non-regulated activities in the UK will be carried out just by the CMA. This contrasts with the current situation where the burden is shared by both the CMA and the European Commission. Over recent years, the enforcement activity of the CMA (and that of its predecessor, the OFT) has been considerably lower than that of the European Commission. Unless there was to be a significant increase in staff and resource at the CMA, the CMA's enforcement resources will be at full stretch.

Legal professional privilege

For the purposes of an EU competition law investigation, the European Commission cannot seize or use as evidence communications with independent, external, EEA-qualified lawyers. Following Brexit, communications with UK qualified solicitors (who are not qualified elsewhere in the EEA) will not be protected under the privilege rules for the purposes of EU investigations. Business will need to work with their external law firms to ensure that they have the best strategy in place to protect sensitive communications under applicable legal professional privilege rules. Lawyers will similarily need to be qualified in an EEA country if they are to represent clients before the European courts in Luxembourg.

How Hogan Lovells can help

With our network of leading competition lawyers across the EU, we can work with you to ensure that you navigate the new competition law landscape which will be created in the event of Brexit in the most effective way possible.

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Implications for international debt capital markets

The UK's debt capital markets may no longer be subject to the relevant EU legislation, although domestic legislation reflecting EU rules would still be in place. The UK government may decide to conduct a review of the existing applicable legislation and determine how much EU law it will retain and consider whether to remove any requirements.

The impact on cross-border capital markets transactions would depend on the precise terms of any exit agreement and the new UK-EU relationship.

Consideration would be needed as to how previously passported prospectuses under the Prospectus Directive would be affected. UK domestic issuances and non-UK issuances may be subject to different requirements.

International debt capital markets

There is currently much uncertainty surrounding the precise implications a UK exit from the EU would have on international debt capital market transactions and risk factors regarding Brexit are now appearing in prospectuses.

In the event of Brexit, and in the absence of any exit agreement addressing this, the UK's capital markets would theoretically no longer be subject to EU legislation. The UK government may decide to conduct a review of the existing applicable legislation, much of which was enacted at national level in order to implement EU directives, such as the Prospectus Directive, the Transparency Directive, the Market Abuse Directive and the Markets in Financial Instruments Directive (MiFID).

Consideration will need to be given as to how EU regulations that were directly applicable such as the EMIR (the EU regulation on OTC derivatives, central counterparties and trade repositories) and the Prospectus Regulation would operate going forward (if at all).

Whilst the UK government may consider streamlining some requirements, we expect they will be keen to strike a balance so as to ensure that the UK remains a globally competitive market and London an attractive listing destination for issuers. If the UK government decided to amend certain previously applicable requirements, thought would be needed as to any phase-in and how existing transactions that complied with the pre-Brexit requirements would be treated.

Although the impact on capital markets transactions would depend on the precise terms of any exit agreement and the new UK-EU relationship, we expect that the UK government would be keen to ensure that the ability to conduct cross-border capital markets transactions would not be significantly prejudiced. Under the EU Prospectus Directive, issuers can passport prospectuses that have been approved by their home competent authority into another EU Member State. It is hoped that the UK government may choose to continue to approve prospectuses in accordance with the EU Prospectus Directive and that EU Member States may adopt a reciprocal approach. Consideration would need to be given as to how previously passported prospectuses would be treated.

As the UK will be free to create its own laws, it may be that UK domestic issuances and non-UK issuances may be subject to different requirements.

There are also other questions such as concerns around satisfying the Eurosystem eligible collateral requirements.

It is unclear how the creation of an EU Capital Markets Union (CMU) would be impacted by Brexit and what, if any, role the UK would seek to continue to play in the CMU. There is uncertainty, for example, as to whether UK securitisations could satisfy the new rules on simple, transparent and standardised securitisations and benefit from the related regulatory treatment (the current proposed rules include a requirement for an EU nexus).

Care may be needed to ensure that key definitions still work in existing transaction documentation. Market participants will also need to keep abreast of any applicable changes to taxation laws.

How Hogan Lovells can help

In the event of a Brexit, our lawyers will closely monitor the legal and regulatory developments likely to impact on international debt capital markets transactions and will work with you to structure and implement your transactions in order to achieve the most successful outcome for your business.

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Implications for data protection

Summary:
UK data protection law is primarily a product of EU law. The primary source of law on this subject, the Data Protection Act 1998 (the "DPA"), implemented the Data Protection Directive. Electronic marketing and cookies are also subject to the Privacy and Electronic Communications (EC Directive) Regulations 2003 ("PECR") which, as is evident from the title, implements another EU Directive.

While the DPA and PECR would maintain the current framework in the event of the UK leaving the EU, significant uncertainties about data protection law in the UK would remain. It is unclear whether the UK would be regarded as a 'safe' destination for data transferred out of the EEA, especially in the light of the upcoming Regulation, which will significantly change EU law. This Regulation will bring further uncertainty, as it is unclear whether the UK would implement its provisions, and if the UK did not, how it would update its data protection law to reflect modern needs. In addition, any Referendum would be likely to take place during the initial transition period of the Regulation, so businesses would face a difficult choice about whether to delay significant compliance projects.

Data transfers
The Data Protection Directive, and also the DPA, prohibits transfers of personal data to countries outside the EEA, unless they have been recognised by the European Commission as providing "adequate protection" to personal data.

It is not clear whether the UK would become a member of the EEA if it left the EU. If it did not, it would no longer be an automatically "safe" destination for EU personal data. It would have to be approved as providing adequate protection for personal data by the European Commission. Until that happened companies based in the EU would need to consider whether they could legitimately transfer personal data to the UK. There are a number of approved mechanisms for doing this, in particular standard form contracts, but they add an additional administrative layer. In some Member States companies would also have to obtain prior authorisation from the local supervisory authority before making any such transfer.

In effect some multi-nationals would find themselves facing a "Safe Harbor 2", a re-run of the scenario caused by the CJEU judgment in Schrems.

It is clear therefore that exit could cause some initial disruption to European business around data transfers to the UK. It is also likely to impact on the number of international businesses setting up in the UK. US corporates, for example, frequently look to set up a European hub or data centre for processing data from all their European offices, as a means of avoiding having to deal with EU data transfer restrictions. Ireland and the UK are popular locations for such hubs due to the pragmatic, less process-oriented approach taken by their regulators. If the UK were no longer part of the EU or the EEA, it would no longer be able to benefit from this (unless or until such time as it received the EU's approval as providing adequate protection).

Whilst one might reasonably expect that the UK would be approved as providing adequate protection given that its law is based on the Data Protection Directive, it is not certain. The Commission has reportedly written to the UK Government in the past criticising it for not implementing the Data Protection Directive fully. Additionally the Data Protection Directive is expected to be replaced in the near future so the DPA could be considered to be no longer adequate when measured against the Directive's replacement, particularly as international data transfers are a politically sensitive issue within the EU in the post-Snowden era.

If the UK left the EU, it would need to decide whether it continued to rely on Commission pronouncements on adequacy or make its own determinations. The most likely body to take on this role would be the Information Commissioner's Office, but it would need additional resources to do this.

Legal change
EU legislative bodies have recently agreed the text of a replacement piece of legislation, the General Data Protection Regulation (the "GDPR"). It seems likely that this will be formally approved in Q2 of 2016, and there will then be a two year transition period, to allow time for business to make the significant process changes which the Regulation will require.

It is likely that the referendum would take place during the Regulation's transition period. Regulations have "direct effect" i.e. the UK would not need to pass additional legislation to implement the Regulation (although certain provisions give Member States discretion as to how to implement them). It is therefore not clear what the Regulation's status would be if the UK left the EU.

Would it remain part of UK law? The current UK government has opposed many of the changes which the Regulation will introduce, which raises the possibility that a future government might seek to reject the Regulation and revert to the existing UK law (which is widely acknowledged to be no longer fit for purpose). Rejecting the Regulation could be seen as a business-friendly move, as it has been criticised for imposing significant levels of bureaucracy, however:

- Reverting to the existing DPA would be unsatisfactory as rapid technological change means it is no longer fit for purpose;
- Reverting to the DPA would also increase the risk of the UK not being recognised by the European Commission as providing adequate protection for personal data.

In the meantime businesses would have to decide whether to commence or delay their compliance projects for the new Regulation, as they may or may not turn out to be necessary.

How Hogan Lovells can help
We have one of the largest and most experienced Privacy and Information Management practices in the world. Our expertise in designing cross-border data transfer solutions for clients means we can help clients address any data sharing issues triggered by a departure from the EU. We can also advise on developing practical compliance programmes to address changes in the regulatory environment, whether or not the Regulation comes into force in the UK.

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Implications for the life sciences industry

Summary:
The life sciences industry is one of the UK's leading manufacturing sectors. It is also one of the most highly regulated sectors and the current UK legal framework governing medicines and medical devices derived from EU legislation.

A Brexit could result in disruption to supply chains, additional quality control testing, new export charges, and uncertainty regarding elements of the regulatory regime going forward, such as the validity of crucial EU regulatory authorisations.

Longer term questions as to the interplay between the UK and the EU's regulatory regimes would also arise, such as whether the UK should retain membership of the EEA and therefore continue to follow the EU regulatory framework for medicines and medical devices, or to agree a trade deal with the EU, which would also likely involve agreeing to adopt all or much of the relevant EU legislation. Both options, though to differing extents, would result in the UK following EU medicines and medical device legislation but with less influence over the content of that legislation than the UK has at present.

Alternatively, the UK could start to develop its regulatory regime without looking to the EU. Any increase in regulation could be burdensome for businesses, while the wider perception of any decrease in regulation would need to be considered carefully in a sector where safety and quality are paramount. Any divergence between the UK and EU regulatory requirements would almost certainly increase compliance costs for companies operating across markets.

Issues to consider
The life sciences industry, comprising pharmaceuticals, medical technology and medical biotechnology, is one of the UK's leading manufacturing sectors, employing in the region of 90,000 people and with exports of pharmaceuticals alone valued at over £21 billion.

The UK currently has amongst the lowest prices for medicines in the EU. Any increase in the complexity of ensuring regulatory compliance and/or additional charges to export products to the EU would likely impact on the UK industry's competitiveness.

A Brexit could result in disruption to supply chains, additional quality control testing, new export charges and uncertainty regarding elements of the regulatory regime going forward, such as the validity of crucial EU regulatory authorisations.

The life sciences industry is highly regulated and the rules for clinical trials and the authorisation, manufacture, distribution, supply, labelling and advertising of medicinal products and the classification, assessment and CE marking of medical devices are (in most part) harmonised at EU level. The UK legal framework governing medicines and medical devices derives from EU legislation. Some EU legislation is directly effective in the UK, while other legal instruments are implemented in the UK by national legislation, such as the Human Medicines Regulations 2012 and the Medical Devices Regulations 2002. If the UK were to leave the EU, there would be uncertainty as to the application of key parts of regulatory regime governing medicines and medical devices going forward.

Taking the specific example of centrally authorised medicines, currently such products are assessed at EU level by the European Medicines Agency (which is based in the UK) and are granted a single marketing authorisation which allows that product to be placed on the market throughout the EU/EEA. A complete Brexit and EEA would mean that EU legislation would no longer apply directly, potentially meaning that such products could no longer, at least technically, be legally marketed in the UK until a national authorisation had been granted.

The UK regulator, the Medicines and Healthcare products Regulatory Agency ("MHRA") currently plays a major role in EU regulatory activities, taking a lead role in approximately 15% of applications via the centralised procedure and is the Reference Member State leading the assessment in the decentralised procedure in over 40% of cases. The ability of the MHRA to remain in this role would also depend on the exact outcome of any Brexit.

In the medical devices sector, once products are assessed and certified as complying with EU medical device legislation requirements and CE marked, they can be sold freely throughout the EEA. Again, if the UK were to leave the EU, it might no longer be automatically possible to sell a CE marked device in the UK.

Even if issues such as these could be resolved relatively quickly, longer term questions as to the UK's continuing relationship with the EU and the interplay between the UK and EU regulatory regimes for medicines and medical devices would need to be addressed.

One option would be for UK to retain its membership of the EEA and follow the examples of Norway, Iceland and Lichtenstein, which are members of the EEA but not the EU. As a condition of the EEA Agreement, the EEA countries have adopted the complete body of EU legislation on medicinal products and are parties to the associated EU procedures. So, for the UK, this would involve agreeing to continue to implement EU legislation in this area and an ability to comment on the development of new EU legislation, though perhaps without the same negotiating strength as at present.

Alternatively, the UK could decide not to be part of the EEA and instead agree a trade deal with the EU. Switzerland has taken this approach and issues separate Swiss marketing authorisations for medicines, based on national requirements that closely mirror EU legislation. In relation to medical devices, Switzerland has transposed the EU Medical Devices Directives into its national law, allowing the free movement of CE marked medical devices in Switzerland. There are also mutual recognition agreements in place between the EU and countries such as Australia, Canada and New Zealand, covering issues such as the recognition of the outcomes of GMP inspections carried out in each country and acceptance of batch certificates without additional control inspections on import.

However, this would likely include conditions such as adhering to the EU's regulatory regime in all material respects, meaning the UK could agree to continue to comply with EU regulatory requirements but no longer have the same ability to influence these as it does at present. Currently, the MHRA plays an active role in the development of EU pharmaceutical and medical device regulation.

A further option is that the UK might start to develop its regulatory regime separately from that of the EU. Any resulting increase in regulation could be burdensome for businesses. Any decrease in legislation would need to be considered carefully in a sector where safety and quality are paramount, particularly given that the current EU regulatory framework for medicines and medical devices is regarded as one of the most comprehensive and sophisticated in the world. Any divergence between the UK and EU regulatory requirements would almost certainly increase compliance costs for companies operating across markets.

How Hogan Lovells can help

Hogan Lovells has an extensive network of EU life sciences regulatory experts who can assist you with assessing and understanding the likely impact of a Brexit on key legal issues facing your business, including regulatory compliance.

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Implications for intellectual property

Summary:

- On Brexit, absent any intervention by the UK government, all pan-EU intellectual property ("IP") rights would cease to apply in the UK
- The only method of IP protection that would apply in the UK would be UK national rights, or those reciprocal rights granted by UK law (e.g. copyright) pursuant to its international treaty obligations. In the case of registered IP rights, that will be those granted by the UK Intellectual Property Office ("IPO")
- On Brexit, all pan-EU court orders issued by a UK court may cease to apply in the EU
- The UK courts may regard pan-EU orders that have already been issued by EU courts as no longer applying in the UK.

Introduction

IP rights are territorial in nature and are typically limited to a particular country. It follows therefore that typically the rules that govern how they may be used, how infringements of them are enforced and how they may be licensed to others will depend on the laws of that particular state. Accordingly, it is relatively common for the courts in different countries to reach different conclusions regarding whether an equivalent national IP right is infringed since in part the answer depends on how the laws of that particular state developed and are applied.

Prior to its accession to the EEC (as it then was), the UK had a well-developed system of intellectual property laws. It was also a member of various international treaties which set out minimum standards for its signatory countries regarding the treatment of IP. Those treaty obligations continued to bind the UK once it became a member of the EEC.

After the UK's accession, and as the EU developed, as a member of the EU, the UK has been and is currently subject to certain rules set out in the EU treaties regarding how IP can be used and exploited. It is a requirement of EU membership that a Member State's national laws must be interpreted in accordance with EU law, which in the case of IP is intended to ensure that IP is treated in an approximate and equivalent way in all Member States. This is because the EU is not supposed to have any internal barriers to trade between its Member States. The creation of the single internal market was intended to ensure that Member States do not act in a way which give their citizens or businesses better opportunities than those of another Member State. Taken to its extreme, this principle might have meant that national IP rights could not exist at all. However, under the EU treaties, they are permitted to exist and be used, provided that they do not unnecessarily create barriers to trade within the single internal market. The way that this has been implemented has been for the EU to make laws binding on all Member States requiring that the scope of protection of the majority of IP rights is harmonised throughout the EU. A Member State is no longer permitted to go its own way with respect to its intellectual property laws.

The sole exception to this principle has been patent laws because of the various political and practical difficulties that the EU has experienced in introducing a unitary patent right across the EU. However, the EU will be introducing the Unitary Patent ("UP"), a pan-EU patent right, and the same principles of harmonising IP laws will then also apply to the Unitary Patent ("UP").

In order that businesses received proper IP protection in the single market, a system of pan-EU IP was created when the internal single market was introduced in 1993 and has continued to develop. The Community Trade Mark (currently known as the CTM, but which will be renamed the EUTM after 23 March 2016), a single trade mark registration that applied in all EU Member States (including in the case of those who acceded to the EU after 1993, from the point of their accession), is currently the most popular form of trade mark protection in the EU. Its relative value for money (when compared to obtaining national registrations in 28 Member States), and comparatively easy to understand procedure has made it a runaway success. It was followed in 2001 by the Registered Community Design and Unregistered Community Design, and it will be followed by the Unitary Patent in 2017 (see below). As each Community IP right has been introduced, rules have been set out governing how these IP rights should be enforced and used, which are binding on all Member States and which their courts are bound to follow.

The result is that after having been a member of the EU for almost 40 years, our national IP law is heavily influenced and circumscribed by EU law. We shall consider below some of the consequences for businesses operating in the UK if the UK were to leave the EU.

National IP Rights

At one level, national IP rights would continue unaffected. Trade mark registrations, patents and registered designs granted by the UK IPO would continue to exist in the same way as they did prior to Brexit. The UK would continue to be bound by the same laws that govern the granting of such rights, and their enforcement. Those laws of course have developed in accordance with the principles of EU law, to which the courts would no longer be subject. We would therefore anticipate that differences would naturally begin to arise between the IP laws that apply in the EU and the ones which would develop in the UK after Brexit. To ensure that the harmonised IP laws are interpreted consistently across the EU, questions regarding their interpretation are referred to the Court of Justice of the European Union (CJEU). As this would no longer occur, and as the UK is a common law country, we would start to see changes fairly quickly as the courts issue new judgments. However, the basic laws would remain the same until Parliament (which would again have full sovereignty) amended or repealed them.

The only UK IP laws that have not yet been harmonised across the EU concern patents. As a member of the European Patent Convention ("EPC"), UK patent law must be interpreted in accordance with the EPC. The UK's membership of the EPC will not be affected by its withdrawal from the EU. However, depending on when Brexit were to occur, the UK may by then be subject to the Unitary Patent.

We expect that the UP and Unified Patents Court ("UPC") will come into effect in 2017 depending on the progress of the ratifications and preparations. For that to happen, the UK needs to ratify the Unified Patents Court Agreement (the UK, France and Germany must all ratify, and so far, only France has done so). If Brexit becomes more likely before the UK has ratified, business may expect the ratification process in the UK to be put on hold to avoid the system going live and then trying to unpick it.

Were the UK to exit, then the project at a European level would need to be revised. The CJEU has made it clear (Kingdom of Spain and Italian Republic v Council of the European Union, Joined Cases C-274/11 and C-295/11) that any country wishing to be involved must be a Member State of the EU. EPC Member States outside the EU, such as Switzerland and Turkey, are necessarily outside of the system. Accordingly, once the system has gone live and jurisdiction over existing European patents designating the UK ("EP(UK)") and UPs has been given to the supra-national court, any exit by the UK would raise issues over the effect of UPs in the UK (would an equivalent UK right be granted), the effect of the new court system and the associated fate of EP(UK)s.

EU IP Rights

Once the UK leaves the EU, EU IP rights (such as the CTM) will cease to apply in the UK. This means that businesses that took the most cost-effective route to obtaining appropriate IP protection by, for example, applying for a CTM knowing that it would cover their most important market, the UK, may find themselves completely unprotected after Brexit.

This would be such an undesirable prospect that the UK government might elect to deal with this by either allowing all such EU IP rights granted up to the date of Brexit to continue to apply in the UK, or by instituting a form of conversion so that they could be converted into national rights. The alternative would be that businesses would have to re-apply for protection for their key IP as national rights. That would work in principle, although the cost might be prohibitive for trade marks, but will not be possible for registered designs or patents since the conditions for protection (which include novelty requirements) would no longer be met.

Any form of national conversion would require primary legislation in the UK and most likely a degree of co-operation with the EU IP authorities. Presumably the extent to which that would be forthcoming would depend on the way in which Brexit occurred.

Enforcement

One of the natural consequences of having a pan-EU IP right is that if it is infringed, in certain circumstances, a claimant may be able to obtain various pan-EU remedies against a defendant. (These are set out in the EU Enforcement Directive). The extent to which the Enforcement Directive is regarded as having been fully integrated into UK law is currently the subject of some debate, but certainly remedies that were alien to the UK national IP laws but which are found in the Enforcement Directive, such as publicity orders, are now being ordered in the UK. As a result, it is currently possible for a successful claimant to obtain pan-EU remedies, including injunctions and publicity orders, from a UK court. Similarly, a court in another EU Member State can issue a pan-EU remedy which is enforceable in the UK.

Whether current orders issued by a UK court would remain enforceable in the rest of the EU once Brexit occurred is moot. It would presumably be for the EU, or the courts of the relevant Member States, to consider whether they would continue to honour the orders issued by a UK court. Businesses may therefore find themselves in the position thatdisputes that had been successfully concluded may be re-opened or that their hard-fought victories are wiped out.

Licensing

Licences, being at heart contracts, may be affected by Brexit. For more information about the impact of Brexit on contracts, please see the Multi-sector section of the Brexit Issues Map.

Conclusion

It is important to note that a full exit from the EU would not happen automatically upon a vote to leave in a referendum. Even if the result of the referendum is a vote to leave, the result itself would have no effect in law so the date from which the UK would cease to be a member of the EU would depend on how the arrangements for Brexit proceed. Businesses would therefore have some time to lobby government, and make plans to consider how they should deal with their IP rights so as to ensure that they are properly prepared for Brexit.

Our recommendations

- As there is going to be a Brexit referendum you should assess the potential implications for your business and consider whether to engage in the debate, perhaps through the CBI or an appropriate trade association such as the British Brands Group, or lobby Parliament and the UK government in relation to areas of particular concern to your business and sector
- If it looks like Brexit may happen, you may wish to consider revising your IP filing strategies so that you are not reliant upon the UK agreeing to honour your EU rights.

How are you drafting your contracts? In much the same way as businesses prepared for the possible impact of the Y2K bug, or accession to the Euro, you could make similar preparations in your contracts if the operation of your contract would be affected by Brexit.

How Hogan Lovells can help

As one of Europe's premier IP practices, Hogan Lovells is well-placed to assist you with planning for any possible EU constitutional change. Please do contact us, or your usual IP contact, if you would like to learn more about how we can help you to prepare for these changes and safeguard your businesses.

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Implications for employment law

Summary:
Given the activism of the EU in the area of employment law over the last 30 years, a Brexit would have a potentially significant impact on the legal framework that surrounds the relationship between an employer and its workforce.

European employment legislation is widely perceived to increase the regulatory burdens on business. Legislation such as the Working Time Directive and the Agency Workers Directive has been criticised as undermining the flexibility of the UK's labour market and increasing the costs to business of hiring staff. In a number of areas there would almost certainly be pressure to repeal UK implementing legislation or amend it substantially in the event of an exit.

However, the extent to which this is in fact possible will depend on the form that any Brexit takes. Were the UK to remain within the EEA, there would be very little, if any, scope for amending the existing employment law framework.

Introduction
Employment legislation is an area in which the EU has been particularly active over the last 30 years, giving rise to complaints from business that these laws impose unnecessary regulatory burdens and undermine the flexibility of the UK labour market. Business organisations have argued strongly that legislation should be enacted at national rather than European level as a general rule in the areas of social and employment policy.

EU law employment law burden
Complaints about the regulatory burden imposed by the Working Time Directive and the Agency Workers Directive are common. Businesses dislike the record-keeping obligations imposed by both pieces of legislation and are concerned about periodic attempts to remove the working time "opt-out" from the Working Time Directive. Recent research by BIS suggested that removal of the opt-out would be harmful both to businesses and to workers that currently choose to opt-out from the 48 hour maximum average working week. It is likely that there would be strong pressure from businesses to repeal the Working Time Regulations and the Agency Workers Regulations were the UK no longer to be bound by the underlying European Directives.

Additional areas of concern
Other areas where the extent of the protection available to workers could be reduced include:

- Protection for workers in the event of business transfers. At the moment employers have to take on existing staff of the transferor on their existing terms and conditions following a business transfer. Even if the "automatic transfer" principle were to be retained, it is likely that it would become easier to change terms and conditions of employment after a transfer. TUPE was reformed in 2006 and again in 2014 and it was recognised on both occasions that it would be helpful to allow more flexibility around post-transfer harmonisation of terms and conditions, but that this was very difficult to achieve in light of existing ECJ case law.

The obligation to inform and consult in a collective redundancy situation could be relaxed or repealed. In particular, the current requirement to inform and consult in the context of changes to terms and conditions of employment could be excluded from the consultation obligation.

- Protection against discrimination on a number of different grounds is a cornerstone of EU law. However, in some cases national legislation prohibiting discrimination was in force before the UK was required to implement such legislation as a result of EU Directives. Given changes in social attitudes, it seems unlikely to be politically attractive to carry out a significant roll-back of anti-discrimination law – see, for example the controversy surrounding Nigel Farage's suggestion last year that race discrimination legislation could be repealed. This suggests that it is very unlikely that the Equality Act 2010 would be repealed on a wholesale basis

- Family-friendly rights such as the protections enjoyed by new and expectant mothers are often criticised as examples of business-unfriendly European legislation. In practice, however, the current rights to maternity, paternity and parental leave and pay go significantly beyond what is required as a matter of EU law. Again it seems unlikely that a post-exit government would be keen to scale back such rights in any meaningful way – or that large employers would abandon their existing family friendly policies in any event, given their significance as a recruitment and retention tool

- "Atypical" workers such as part-time workers and fixed-term employees are entitled not to be treated less favourably than comparable full time or permanent staff. Although this is a requirement of EU law, in practice the rules (which have now been in force for nearly 15 years) have not given rise to significant practical difficulties for most employers, so it remains to be seen whether removing these rights would be a significant political priority.

Returning control of employment law to the UK

Overall, returning control of employment law to the UK is seen as one of the advantages to business of an exit. As such it does not present particular challenges for most employers. One exception to this will be for multi-national employers, with workforces spread across Europe. It is far from clear at this stage how the freedom of movement principle would apply in the event of an exit; at some stage staff may need to be relocated to and from the UK if workers no longer have the right to work freely across the EU.

However, a key point for employers is that if a "half-way house" approach to any exit is adopted, with the UK opting to join the EEA for example, employment policy will in fact have to remain unchanged. If the UK joins the EEA it will be obliged to continue to comply with EU social and employment laws, in circumstances where the UK has lost its right to negotiate and influence the development of such laws. This could for example result in a situation in which the UK continues to be bound by the Working Time Directive, and the EU decides to remove the working time opt-out. In this situation the UK would remain bound by the employment laws that it finds particularly burdensome, without having the ability to influence the outcome of the European legislative process.

How Hogan Lovells can help

The changes in employment law and practice of the type that would be likely to occur on an exit from the EU would obviously have the potential to impact businesses in the UK in a major way. While some of these changes would probably be positive and result in a reduced regulatory burden, in other areas employers would need to think carefully about the impact on their workforce and their reputation of adopting a minimalist approach to employment standards.

Hogan Lovells' UK employment team can obviously provide advice on any employment law changes that stem from a decision to exit Europe and their impact on your obligations as an employer. More importantly, over and above being legal advisers to our clients, we aim to be their business partners. Our philosophy is to work as a close part of the client's team – we deliver a consistently excellent service by putting our clients first. This approach to client service enables us to advise on the HR and reputational impact of decisions about how to respond to a changed employment law environment, as well as the purely legal considerations.

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Implications for taxation

Summary:
The UK tax implications of Brexit are difficult to predict, not least because the terms of any future exit are, as yet, unclear. However, we can say that, unless the UK enters into comparable arrangements with EU Member States (through membership of the European Economic Association, the European Free Trade Association ("EFTA") or otherwise), leaving the EU could mean that UK businesses:

- are exposed to a VAT regime which diverges from the rEU regime, so that VAT does not operate seamlessly on inbound or outbound transactions with rEU states
- cease to be able to benefit from tax advantages currently available as a result of the EU's fundamental freedoms, or directives such as the Parent-Subsidiary Directive, the Merger Directive and the Capital Duty Directive; and
- in some cases, benefit, for example, if a UK Government unconstrained by EU State aid rules and fundamental freedoms provides certain UK businesses with more favourable tax treatment than that provided to other businesses.

  On the other hand, future protectionist tax measures may be more aggressive. Diverted Profits Tax appeared to have been softened by the spectre of EU law. Future laws may not be.

Introduction
There are many uncertainties surrounding Brexit. What will be the result of the EU referendum? If the UK votes "no" to being in the EU, on what basis will it leave the EU? Will it remain in the European Economic Association (like Norway), join the EFTA (like Switzerland) or have a completely different relationship with the EU? What is certain is that leaving the EU has the potential to change the tax environment in the UK.

What will have to change?
Value Added Tax ("VAT")
If the UK leaves the EU, it will no longer be required to give effect to the VAT Directive and so will no longer have to require UK businesses to charge, and pay, VAT on domestic supplies of goods and services. However, as VAT constitutes a large proportion of the UK Government's annual tax revenue (22% in 2014/15), it is unlikely that the UK Government would repeal it without replacing it with a new UK sales tax. Before VAT was introduced in 1973 Purchase Tax applied in the UK at various rates on different items depending on their degree of perceived luxury.

A UK Government unconstrained by the VAT Directive would have more flexibility as to the rate of a new UK sales tax and could, for example, set its own rates and determine the types of goods and services subject to each rate.

Such flexibility could be used for political purposes (for example, a higher rate of VAT could be imposed on luxury items or highly calorific foods).

Even if it wished to, it is unlikely that the UK Government could apply the current VAT rules to a UK sales tax without modification. There is therefore a question about the extent of such modification. Would any UK sales tax: (i) mirror VAT as closely as possible, both at the time it came into force and in the future; (ii) mirror VAT as closely as possible on introduction but not reflect future changes to EU law; (iii) be broadly similar to VAT; or (iv) be different to VAT. Whichever option is pursued, UK businesses transacting with suppliers or customers in EU Member States are likely to suffer increased costs as a result of applying different systems.

Whichever option is chosen, there is also a further question about the extent to which existing and future EU jurisprudence, for example, decisions of the Court of Justice of the European Union ("CJEU"), would assist in interpreting the law applicable to the UK sales tax. Presumably, for periods prior to Brexit, decisions of the CJEU would remain binding but the position is less clear following exit.

Parent-subsidiary directive
If the UK leaves the EU, it will no longer be required that the Parent-Subsidiary Directive applies on payments to or from the UK. Broadly, this Directive provides that where a parent company in one EU Member State receives distributions of profits from a subsidiary company in another EU Member State, the EU Member State of the parent company must not tax the receipt or, if it does (in certain circumstances in the case of the UK), must allow the parent company credit for tax paid by the subsidiary company in respect of the profits distributed.

If the UK leaves the EU and so the Parent-Subsidiary Directive no longer applies, a group of companies with (a) a parent company in the UK and subsidiaries in an EU Member State or (b) a parent company in an EU Member State and subsidiaries in the UK may become subject to double taxation in respect of profit distributions, unless a double tax treaty or similar arrangement prevents such double taxation. In fact the UK is one of the jurisdictions that has concluded the greatest number of double taxation agreements including with all current members of the EU.

Merger directive
If the UK leaves the EU, it will no longer be required that the Merger Directive applies on transactions with the UK. This Directive is designed to remove fiscal obstacles to cross-border reorganisations. In the case of mergers involving a company transferring assets and liabilities to one or more companies in a different EU Member State, the Merger Directive provides for a deferral of the taxes that could be charged on the difference between the real value of such assets and liabilities and their value for tax purposes (subject to certain conditions).

If the UK leaves the EU, it will not need to comply with the Merger Directive and, accordingly (assuming it does not enter into similar arrangements with EU Member States), will be free to impose tax on cross-border mergers of UK businesses. Similarly, EU Member States would be free to tax businesses in EU Member States that merge with UK businesses.

What may change?
State aid
If the UK leaves the EU (assuming it is no longer part of the European Economic Association and does not join EFTA or enter into similar arrangements with the EU), it will no longer be subject to EU law restrictions when seeking to grant State aid. The corollary of that, however, is that it will no longer have any recourse through the EU against EU Member States introducing State aid that disadvantages
UK businesses. Equally, tax rulings agreed with HMRC will not be subject to review by the Commission under its State aid powers.

Capital duties directive
If the UK leaves the EU, it will no longer be required to give effect to the Capital Duties Directive. Broadly, this prevents EU Member States from charging indirect tax in respect of the raising of capital by companies (for example, by issuing shares or other securities) in certain circumstances.

UK legislation currently imposes a 1.5% stamp duty reserve tax ("SDRT") charge on issues of shares and securities to depositary receipt issuers and clearance services in certain circumstances. However, as a result of the Capital Duties Directive, and decisions of the CJEU and First Tier Tax Tribunal, HMRC announced it would no longer seek to impose such a charge.
If the UK were no longer in the EU, assuming it does not enter into similar arrangements with EU Member States, the UK Government would be free to impose this SDRT charge. If it wished, it could also impose a new capital duty.

Other directives and legislation
There are many other tax-related directives and regulations which will cease to have affect.

Notably, the existing Arbitration Convention, and the proposals for all tax disputes between Member States to have a mandatory dispute resolution mechanism, will not directly apply.

The Anti Tax Avoidance Directive, currently in draft, will also likely not come into force in relation to the UK. The immediate impact is that the UK will be free to develop and implement its own rules on taxation of hybrid instruments and tax deductions for interest: as things currently stand the well-developed government proposals risk being simply overridden by that Directive.

Other areas of incompatibility with EU law

If the UK leaves the EU (without entering into similar arrangements), it will no longer be required to ensure its tax legislation is compatible with EU law.

In the past, the CJEU has declared UK tax legislation to be incompatible with EU law and required such legislation to be amended. For example, in HMRC v Philips Electronics UK Ltd (C-18/11), the CJEU held that the UK consortium relief rules, which denied relief for UK losses of non-UK resident companies carrying on a trade in the UK through a permanent establishment if it was possible for the loss to be relieved overseas, were contrary to the freedom of establishment. Following Brexit, UK tax legislation will no longer be open to challenge on the basis that it is contrary to EU law.

What may change?

The practical impact of any of these points will depend on what is negotiated. The UK and the rEU states may be motivated to agree replacement measures with identical or similar effect.

There may also be a toughening of measures such as the CFC regime and Diverted Profits Tax. Their design has clearly been influenced by the impact of EU law.

What is likely to stay the same?

Brexit is unlikely to have a material effect on Scottish Land and Buildings Transaction Tax, Stamp Duty Land Tax or the Annual Tax on Enveloped Dwellings.

How Hogan Lovells can help

We would be happy to assist you to understand the implications of Brexit on your business and to take the steps necessary to enable you to be prepared if Brexit becomes a reality. In particular, we would be able to:

- monitor political and legal developments to determine the likely tax implications of Brexit;
- advise on the possible tax implications of Brexit in relation to particular investments, transactions or contemplated scenarios; and
- assist you to future proof your business.

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