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Brexit

Contents

Foreword

David Cameron has announced that the UK Referendum on Brexit will take place on 23 June 2016. As we consider the potential impacts on our business I have talked to a wide range of Ashurst partners and lawyers, and I know that they have a diverse range of views as to the merits of the question. The same will be true of our clients at both an institutional and a personal level. In any event, it seems likely that uncertainty as to the outcome of the Referendum and as to the conditions of any exit will impact negatively on growth in the short term regardless of the outcome of the vote. This briefing does not attempt to determine whether that impact is justified or worthwhile. What it does do is to cut through the rhetoric to explain what a post-Brexit legal environment might look like and how this might impact on your business, as well as exploring how the possibility of Brexit is perceived by our European colleagues.

In this briefing we consider the original UK requests and the EU response, the withdrawal process and the available models for on-going relationships. We then look at a number of pervasive legal, regulatory and tax issues and the impact of Brexit on key industries, notably financial services.

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Proposal for a new settlement for the UK within the EU

The tables below summarise the reforms requested by the UK and the key proposals agreed at the EU summit as well as providing commentary on those proposals. It does not cover the proposals regarding social benefits and free movement. The proposals principally take the form of a legally binding Decision of the Heads of State or Governments together with various Council and Commission Declarations (which will become effective if the United Kingdom decides to remain a member of the European Union) with the anticipated incorporation of the substance of a few elements covered by the Decision into the Treaties at the time of their next revision.

Competitiveness

UK REQUEST	MAIN EU PROPOSAL	ASHURST COMMENT
A target to cut the amount of existing regulation on business.	All EU institutions and Member States will take concrete steps towards better regulation by repealing unnecessary regulation.	**Similar declarations (for example, the Lisbon agenda on competitiveness) could be said to have had minimal impact previously.**
A clear long-term commitment to boost the competitiveness and productivity of the EU and to drive growth and jobs for all.	Establishment of a mechanism to review existing EU legislation for compliance with the principles of subsidiarity and proportionality. This will be done alongside the existing 2015 Better Regulation Agenda and the Regulatory Fitness and Performance Programme (REFIT).	

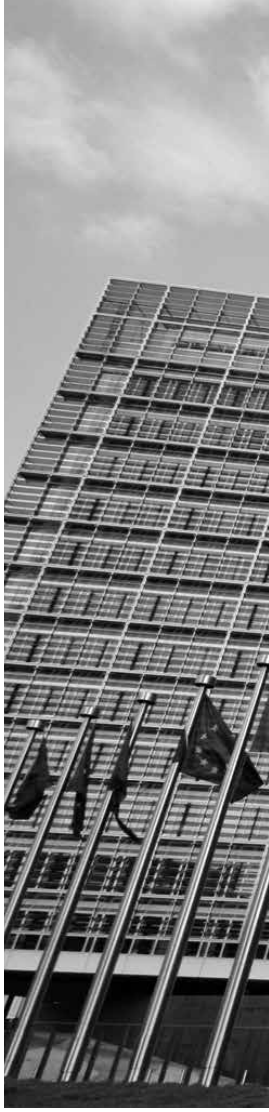
Sovereignty

UK REQUEST	MAIN EU PROPOSAL	ASHURST COMMENT
An end to the UK's obligation to work towards "ever closer union".	Recognition that the UK is not committed to further political integration into the EU and that this will be incorporated into the Treaties at the time of their next revision and acknowledgment that references to ever closer union do not offer a legal basis for extending the scope of any provision of the Treaties or of EU secondary legislation.	**There remains scope for significant differences of view here.**
An enhancement of the role of national parliaments where groups of national parliaments, acting together, can stop unwanted legislative proposals.	If reasoned opinions are issued by national parliaments stating that draft EU legislative acts do not comply with the principle of subsidiarity and these opinions represent more than 55 per cent of the votes allocated to national parliaments, the Council Presidency will include the item on the Council's agenda for discussion. After discussion, representatives of Member States can discontinue consideration of the relevant draft law unless it is amended.	**New red card subsidiarity control mechanism. May be rarely applied in practice.**
A fully implemented commitment to subsidiarity.		

Economic governance

UK REQUEST	MAIN EU PROPOSAL	ASHURST COMMENT
Legally binding principles recognising amongst other things that:		
The EU has more than one currency.	Discrimination based on currency of a Member State is prohibited.	**This seems like a helpful formulation of a demand which was itself significantly unclear in terms of scope.**
Any changes decided by the Eurozone (such as the creation of a banking union) must be voluntary for non-Euro countries.	Acknowledgement that EU law on the banking union conferring upon the ECB and other bodies authority over credit institutions is applicable only to credit institutions located in Member States whose currency is the Euro or in Member States that have concluded with the ECB a close co-operation agreement on prudential supervision.	**To some extent, this is simply a statement of the existing factual and legal position. By stating this, however, the UK seems to intend to emphasise the distinction between Eurozone and non-Eurozone states, and the need for regulatory distinctions to be drawn between them. In political terms, it may be seen as a "line in the sand".**
Financial stability and supervision is a key area of competence for national institutions like the Bank of England for non-Euro members.	Acknowledgement that (i) the single rulebook is to be applied by all credit institutions and other financial institutions in order to ensure a level playing field within the internal market and that (ii) substantive EU law may need to be applied differently by the ECB than corresponding rules to be applied by national authorities of Member States that do not take part in the banking union (such as the UK). To this end, specific provisions within the single rulebook and other relevant instruments may be necessary, while preserving the level playing field and contributing to financial stability.	**The original EU proposal seemed to envisage that non-Eurozone states would have the power to develop their own secondary laws in relation to financial regulation. This idea has been significantly reduced in the final text, which refers only to "specific provisions" within the single rulebook being potentially different. The UK made a concession here – but retained flexibility in relation to supervision and resolution (see below).**
Any issues that affect all Member States must be discussed and decided by all Member States.	Emergency measures addressed for safeguarding the financial stability of the euro area will not entail budgetary responsibility for Member States whose currency is not the Euro or for those not participating in the banking union.	**This is intended to be a clarificatory statement.**
	Certain measures, including the supervision or resolution of financial institutions and markets and macro-prudential responsibilities, to be taken to preserve the financial stability of Member States whose currency is not the euro are (subject to group supervision and resolution) a matter for their own authorities, unless such Member States wish to join common mechanisms open to their participation. This is without prejudice to the development of the single rulebook and to Union mechanisms of macro-prudential oversight for the prevention and mitigation of systemic financial risks in the Union and to the existing powers of the Union to take action necessary to respond to threats to financial stability.	**The first part of this provision seems to give the UK precisely the autonomy in relation to regulatory supervision and resolution – including for financial markets – that it wanted. The second part is unclear, but potentially could reverse some of the substance of the first, depending on the interpretation of "preserving financial stability" and the scope of the powers referred to (which have not been considered to be clear, as a legal matter, in the past). Nonetheless, the UK has won the principle of freedom from Eurozone bail-outs and some degree of flexibility in relation to regulatory supervision.**
	Mechanism to enable non-banking union Member States the power to require the Council to discuss issues relating to legislative acts which are to be adopted by qualified majority. This is without prejudice to the normal operation of the legislative procedure of the Union and would not allow a Member State a veto.	**This is the expected compromise which would allow non-banking union members to challenge actions taken by the banking union members.**

Brexit: Leave or Remain?



The impact of a "Leave" vote in the Referendum and the resulting departure of the UK from the EU will largely depend upon the relationship between the UK and the EU that follows. This will be the subject of lengthy and complex negotiations. There is no certainty at this stage on either the shape of a post-Brexit world or the path to reach it, and much will depend upon the attitude of the remaining Member States.

It should be noted that from a legal perspective on the day after the Referendum, nothing will change. In the event of a vote in favour of Brexit, the questions will then be:

- how the UK is disentangled from the EU;
- what UK legislation replaces the huge volume of EU-derived regulation currently on the statute book; and
- what form our post-Brexit relationship with the EU will take.

"There is no certainty at this stage on either the shape of a post-Brexit world or the path to reach it, and much will depend upon the attitude of the remaining EU Member States."

WITHDRAWAL

Following the process set out in Article 50 of the Treaty on European Union, withdrawal would take effect on the date of conclusion of a withdrawal agreement and failing that, the date that is two years after the initial notification of withdrawal by the UK Government to the European Council unless all parties agree to extend the timetable. Whether an extension would be granted may depend on perception of how the UK has behaved during the Referendum process and the subsequent negotiations. It is possible that the UK could be shut out of the internal market of the EU before the new relationship has been agreed. During the two-year withdrawal period, the UK would be in an uncertain position with no real standing to influence further decision-making within the EU, whilst still technically being a Member State.

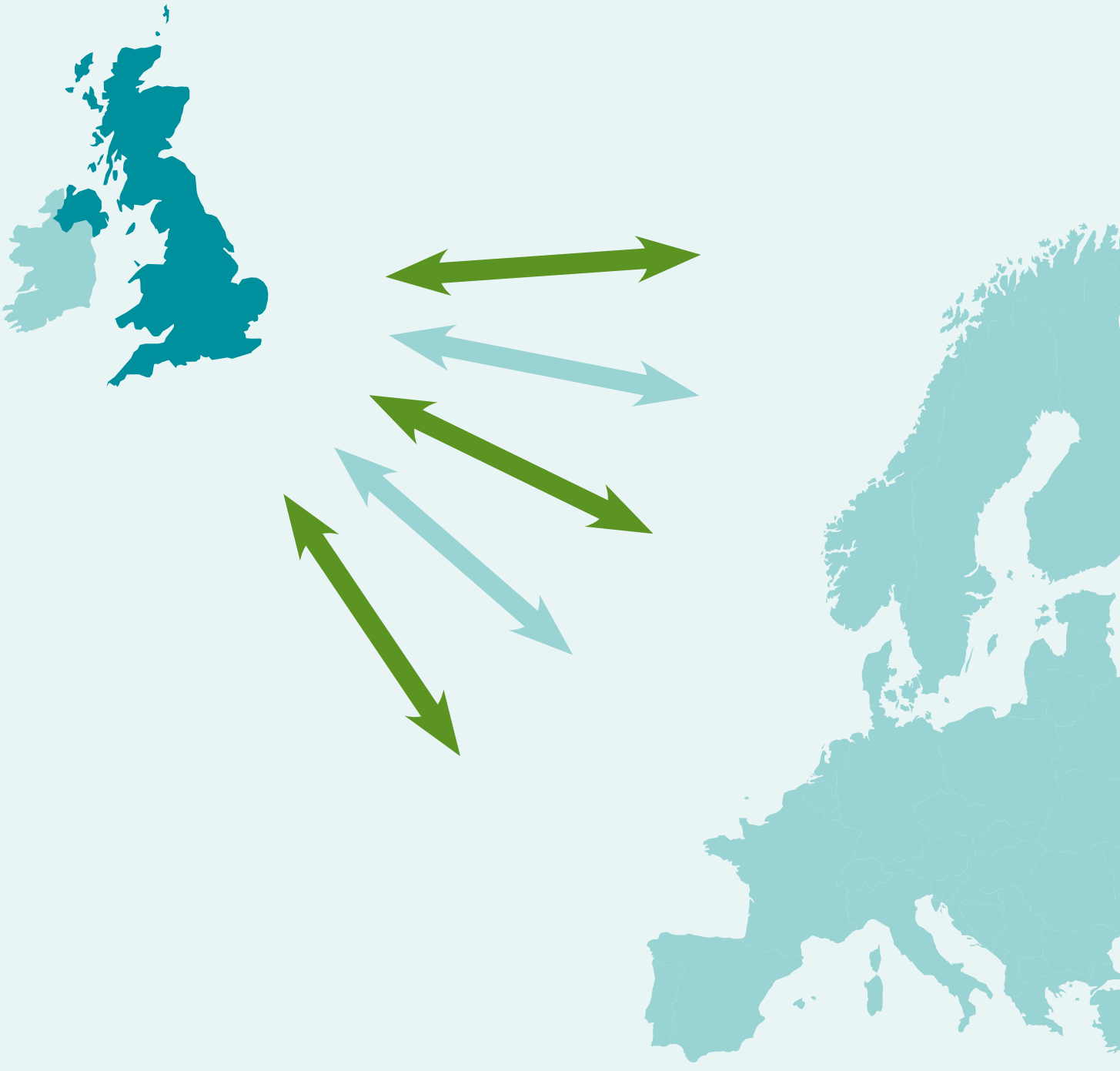
LEGISLATION

From the UK perspective, Brexit would be achieved through the repeal of the European Communities Act 1972. Without savings provisions, Brexit would cause huge swathes of UK legislation to fall away. Accordingly, it is expected that the UK Government would enact saving legislation to maintain the status quo, at least for a transitional period, to allow EU regulations and secondary legislation enacted to implement EU legislative provisions set out in directives, which would otherwise cease to have effect after withdrawal, to continue to apply in the UK. Thousands of pieces of EU-derived legislation would need to be replaced in time. A conservative estimate is that this would take ten years.

Ongoing relationship with the EU

There are five broad models for the UK's ongoing relationship with the EU. The impact of Brexit on business will depend upon the model chosen. The UK Government has given no indication of which model it might aim for should Brexit occur.

Brexit would not only affect the UK's ongoing relationship with the EU but also a number of relationships with third countries which have been negotiated between the relevant third country and the EU as a whole. These agreements may also need to be re-negotiated on a bilateral basis.



1

CANADIAN-STYLE FREE TRADE AGREEMENT (FTA) APPROACH

This model would require the negotiation of a comprehensive bilateral free trade agreement with the EU. Common regulation may need to be agreed.

Whilst tariff barriers between the EU and the UK would be unlikely, a degree of commonality of standards/ regulation would be required. This model has the benefit of no UK contribution to the EU budget and freedom to impose immigration controls and the UK would have the freedom to regulate its own financial services sector. A comprehensive agreement may provide reasonable access to the internal market of the EU in financial services, however, the UK would have no influence over EU regulation of the sector. In Ashurst's view, given the stated goals of Brexit, this seems the most logical and likely outcome.

2

WORLD TRADE ORGANIZATION

Under a "most-favoured nation" (MFN) based approach, the EU would be required to grant to the UK trade advantages which are at least equal to those granted to the EU's "most favoured nation" (i.e. the nation to which it gives the "best" treatment).

This model requires members of the World Trade Organization not to treat any member less advantageously than any other; if preferential treatment is granted to one country the same must be done for everyone else, subject to certain exceptions, allowing preferential treatment for developing countries. The UK would, however, be subject to the EU's common tariff, which could have a detrimental impact on trade. Common regulation would not need to be adopted between the UK and the EU, however, the UK's exports to the EU would have to comply with all relevant EU technical standards without the UK having any influence over how these standards are developed or applied. Whilst the UK would have the freedom to regulate its own financial services sector, it would no longer have automatic access to the internal market of the EU. This model has the benefit of no UK contribution to the EU budget and freedom to impose immigration controls.

3

TURKISH-STYLE CUSTOMS UNION

The UK could form a customs union with the EU, similar to that established between the EU and Turkey, benefiting from a free trade area and establishing a common external tariff.

This model has the benefit of no UK contribution to the EU budget and freedom to impose immigration controls but does not enable unhindered access to the internal market of the EU. This option allows continued tariff-free trade in goods but requires the UK to comply with EU regulation on product standards whilst losing any influence over that regulation.

4

SWISS-STYLE BILATERAL ACCORDS

The UK may follow the Swiss approach and agree a set of bilateral accords governing the UK's access to the internal market of the EU in prescribed sectors.

The UK would need to adopt EU standards of regulation in those sectors and would need to negotiate FTAs separately in respect of other sectors. In 2010, the Council of the EU questioned the ongoing viability of the Swiss model due to its complexity and legal uncertainty and on that basis, this model may not be available to the UK.

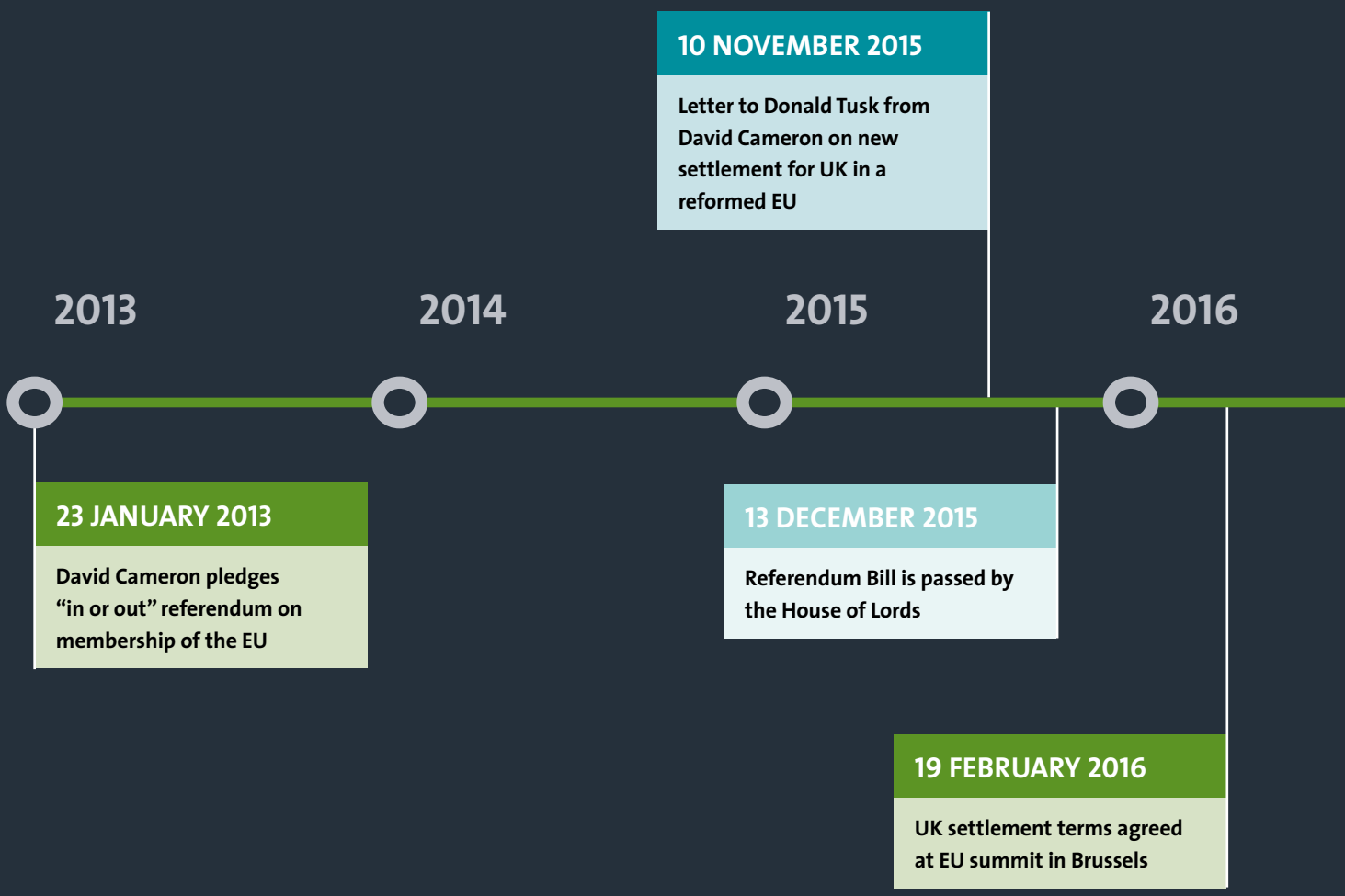
5

NORWEGIAN-STYLE EEA AGREEMENT

If the UK retained EEA membership, it would maintain access to the internal market of the EU (other than in financial services) and would be required to retain/adopt EU regulation with little influence over policy.

The UK would still have to make a substantial contribution to the EU budget and would be unable to impose restrictions on immigration. The political weight of non-EU members of the EEA has been progressively reduced over time so this model has few benefits. Accordingly, it is considered unlikely that this approach will be adopted as, despite the economic advantage of continued access to the internal market of the EU, it does not address the political drivers for the Referendum.

Brexit: The path to the Referendum and beyond

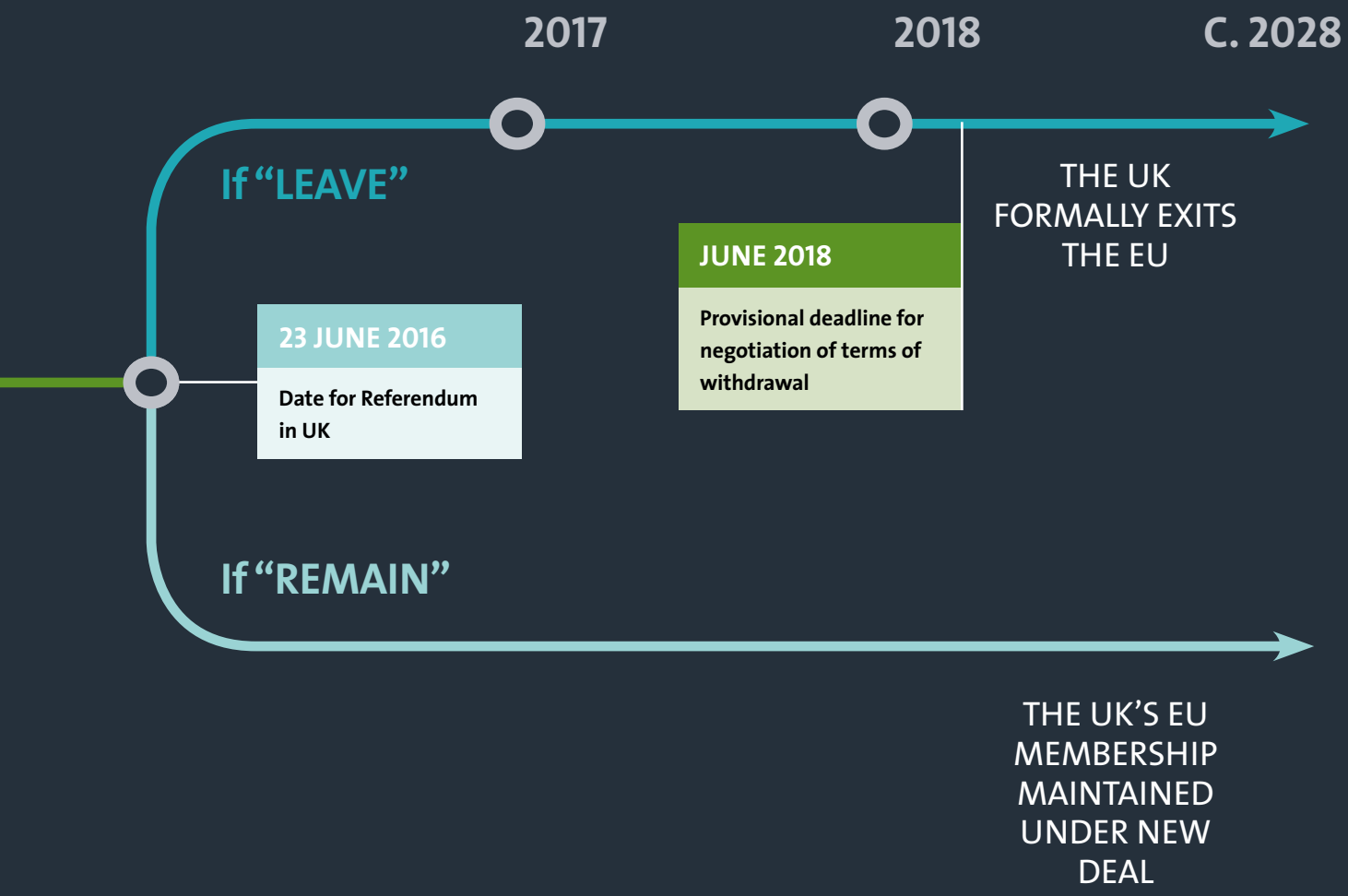


Two-year time limit from formal notification of intention to withdraw under Article 50 of the Treaty on European Union (unless unanimously extended) during which the UK Government has to negotiate the terms of withdrawal

Further EU negotiations to define the ongoing relationship post-Brexit

The UK Government to pursue a number of third-party negotiations to replace treaties that no longer apply, such as FTAs

Enactment of replacement UK legislation



View from Ashurst

It is difficult to be precise as to what the key issues will be for business in the event of Brexit until it becomes clear how the UK's future relationship with the EU is to be structured. If we retain membership of the EEA, it seems likely that substantive law in the UK may not change significantly. However, at the other end of the spectrum, a WTO-type arrangement may lead to a number of significant changes. We highlight some of the key considerations for businesses in respect of each of these structures below.

CONTRACT LAW

Choice of law

Currently, choice of law in respect of contractual obligations and non-contractual obligations is governed by the EU Rome I and Rome II Regulations respectively. In respect of contractual obligations, it is unlikely that the position regarding the interpretation of a choice of English law in a contract (whether in the UK, or in the remaining Member States) would materially change in the event of Brexit. Although the Rome I Regulation would cease to have effect in the UK (in the absence of saving legislation), the position in the UK pre-Rome was not materially different and would give rise to the same result (i.e. any contract whereby parties have expressly agreed the governing law will not be affected). In any event, if the UK retains membership of the EEA, rules on choice of law in relation to contractual obligations will be governed by the Rome Convention which has broadly the same effect. In relation to choice of law for non-contractual obligations, the position is less clear. Currently under the Rome II Regulation, commercial parties can expressly agree the law to govern not only their contractual but also their non-contractual rights and liabilities. This will continue to be upheld by the remaining Member States. However, in the UK, the position could be different (irrespective of the future relationship that the UK has with the EU following Brexit). Prior to Rome II coming into force in 2009, the Private International Law (Miscellaneous Provisions) Act 1995 applied to torts committed on or after May 1996. The general rule under that Act was that the applicable law is the law of the country in which the events constituting the tort occurred. It is currently unclear as to whether saving legislation would be implemented in respect of Rome II in the UK following Brexit.

Contractual interpretation

It is possible that, as a result of the uncertainty that Brexit is bound to create, unscrupulous counterparties may be encouraged to try to avoid the contractual obligations, to attempt to terminate contracts by seeking to rely on either a force majeure clause or a material adverse change clause, or to argue that a contract has been frustrated. However, any right to terminate a contract would depend on its terms, and it is unlikely in our view that rules of contractual

interpretation will be dramatically affected (but note our comments below in relation to EU jurisprudence). Disputes may also arise with regard to the uncertainty as to the application of EU legislation when interpreting pre-existing contracts. For example, where a contract requires contracting parties to comply with specific EU legislation, how should the English courts interpret such clauses post-Brexit? With regard to a choice of law clause which specifies English Law, how should a contract be interpreted if at the time of entering into the contract EU law formed part of English law, but during post-Brexit performance it does not? It is likely that a court would find that a choice of English law should be interpreted to mean English law as it stands from time to time, subject to any variations, including such variations arising out of Brexit. There may, however, be circumstances in which a key provision of EU law is essential to the operation of a particular contract, so that without it, the contract is inoperable or incapable of being performed as originally intended. Again this is an issue of contractual interpretation.

DISPUTE RESOLUTION

EU jurisprudence

Generally, as a consequence of Brexit, the UK courts would no longer be obliged to apply EU jurisprudence. Further, judgments of the EU Court of Justice (CJEU) would no longer directly bind the UK courts, even if the UK retains particular EU legislation (as seems likely to us, especially in the field of financial services where, as we note below, it is unlikely that the substantive law will change dramatically – see section entitled "Financial Services" for further detail). This may lead to inconsistent decisions. However, if we retained membership of the EEA it is likely that we would find ourselves indirectly bound by CJEU precedent as the EFTA court interprets EU legislation which applies to EEA members consistently with the CJEU. In any case, we would suggest that CJEU decisions will remain persuasive unless directly approved by a UK court or expressly saved by UK legislation (the UK Government may consider passing legislation that all EU legislation as interpreted by the CJEU shall remain in effect until individually amended or repealed by further legislation).

Enforcement of judgments

We expect that, in the event of Brexit, the UK (and, to a significant extent, all remaining Member States) would want to ensure that the position regarding jurisdiction and reciprocal enforcement of judgments under the Brussels Regulation would be preserved. However, in the absence of such agreement, there could be considerable uncertainty in relation to jurisdiction and the enforcement of judgments, and much may depend on domestic rules of law in the relevant Member State (see our comments below in relation to insolvency proceedings in particular). This lack of harmonisation may create difficulties in the enforcement of legal rights and obligations. However, two international conventions mitigate this uncertainty: the Hague Convention on Choice of Court Agreements and the Lugano Convention. The UK may decide to sign up to these conventions following Brexit. The Hague Convention on Choice of Court Agreements is a worldwide framework of rules on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters, to which all Member States (apart from Denmark) are signatories. The Lugano Convention, which currently only applies to Iceland, Norway and Switzerland, is similar to the Brussels Regulation and governs jurisdiction enforcement issues between EU members and the European Free Trade Association (EFTA) states. If the UK retains its membership of the EEA, it is likely that it would accede to the Lugano Convention. Arbitration should not be affected because the UK will remain a party to the New York Convention 1958.

EMPLOYMENT

General

Whilst possible, it seems highly unlikely that employment law based on EU principles and legislation would be immediately repealed, irrespective of whether the UK retained EEA membership or opted for a more radical approach. For example, an immediate withdrawal of the Transfer of Undertakings (Protection of Employment Regulations 2009) would cause extreme difficulty for many commercial outsourcing partners who would have assumed that TUPE would apply to their entire contractual relationship. As noted in several sections of this briefing, it seems to us highly likely that the UK Government would use saving legislation to preserve the current status quo in many instances. It also seems likely that, whatever the UK's future relationship with the EU after Brexit (whether retaining membership of the EEA (where members are obliged to recognise several EU employment-related directives), or entering into bilateral agreements with individual Member States, etc.), there is likely to be little change to UK employment law. In any event, much of our employment law in fact exceeds EU standards (for example, family leave rights) or is specific to the UK (such as unfair dismissal), so it seems unlikely that Brexit, in whatever form, would have a significant impact on the majority of UK employment law.

Immigration

Whilst this is one of the matters capturing headlines in relation to the UK's attempts to negotiate revised EU membership terms, it should be noted that if the principle of free movement ceases to apply, this could have an adverse effect on employers who have a mobile workforce or who regularly recruit skilled, multi-lingual workers from the EU. It remains to be seen whether a points-based system (currently applied to non-EU nationals) would be replicated for EU citizens or whether a series of separate agreements with individual Member States would be required.

Social security arrangements

Currently, if an individual goes to another Member State to work for less than 24 months, then there is generally no need to make social security contributions in the destination Member State. Instead, contributions must usually be made in his or her home Member State. That is a useful simplification, avoiding the need for multiple social security treaties, and has also been adopted by EFTA countries.

TAX

Ireland, with its 12.5% corporation tax rate on "good" trading profits, Luxembourg, with its rulings system, and perhaps to a lesser extent, the UK have all been the beneficiaries of tax competition within the EU. Brexit could, in theory, give the UK increased flexibility to optimise its tax policy from that perspective (but not if it retains membership of the EEA). However, that flexibility will be constrained by the OECD-led project on base erosion and profit-shifting (BEPS) which the UK has supported and will continue whatever the outcome of the Referendum. Brexit may give scope for the UK to introduce some form of sales or consumption-based tax in an effort to harvest more tax revenue from the largely US-based multinationals with significant sales in the UK.

UK as a holding company jurisdiction

Whilst not as popular historically as Luxembourg, the UK has become a common holding company jurisdiction over the past five years for multinationals and private equity groups as a result of the UK Government's corporate tax roadmap. Any Brexit which did not preserve the withholding tax exemptions available on inbound dividends under the Parent/Subsidiary directive would lead to reconsideration of those structures, and perhaps restructurings.

Customs union

Goods are allowed to circulate freely between Member States. However, customs duties are imposed by the EU on goods imported from third countries by means of a common external tariff. Once duties have been paid on the import of third country goods, they can then circulate freely throughout the EU. Given the importance of the EU as a trade partner for the UK, it is unthinkable that the UK will not seek to enter into some sort of customs arrangement with the EU. That would be possible by retaining membership of the EEA, or perhaps more likely in either some form of customs union similar to the one in place between the EU and Turkey or free trade arrangement like that with Canada. EU regulations and standards in relation to customs are likely to continue to apply to the UK in varying degrees if one of these models is adopted. Moreover, if a Turkish-style customs union is followed, the UK may be required to apply the EU's common external tariff on imports from outside the EU. However, if the UK opted for a more radical solution, it may seek to rely solely on existing WTO rules instead of pursuing a specific free trade partnership with the EU. Although EU regulations and standards will no longer apply to it, UK imports into the EU will be subject to the EU's common external tariff.

VAT

Shortly after Britain joined the EEC in 1972, VAT was introduced as an implementation of the EU's VAT directive in April 1973. Since its introduction, VAT has become an important source of revenue for the UK Government. It is estimated to raise £133bn out of a total of £673bn of UK Government receipts in 2015/2016. This is over three times the amount that is projected to be raised from corporation tax. Given the importance of VAT to UK Government receipts it is inconceivable that there would be drastic changes to the VAT system in the event of Brexit. However, Brexit could give the UK flexibility to introduce additional turnover taxes, to reclassify goods/services as taxable, zero-rated, reduced-rate or exempt and to change the rates of tax charged subject to the domestic enactment of the VAT lock (which prevents increases in VAT rates or reclassification of supplies currently at a reduced rate or zero rate until the next general election). All these changes would currently be prohibited or subject to substantive limitations under EU law. Following Brexit, the UK may take a similar approach to Norway and Switzerland which have both

based their VAT legislation on the EU model without being subject to the VAT directives. However, questions will arise as to the classification of supplies between the UK and the EU. This will be of importance to importers and exporters. In particular, those companies providing cross-border exempt financial services will need to examine the impact of any such changes on their right to recover input VAT. Over time, the increased divergence between the EU VAT system and the UK VAT system may well lead to increased compliance costs and the potential for mismatches in treatment of cross-border supplies.

INSOLVENCY

Over recent years, the UK has become the restructuring capital of Europe, with many international companies relying on the High Court in London for their financial restructuring. This has enhanced the UK's attraction in terms of investment and trading opportunities (particularly in respect of distressed investors who typically use the UK as an English-speaking jurisdiction which provides a gateway to the EU). However, this pre-eminent position may be jeopardised as a result of Brexit for the following reasons:

European Insolvency Regulation

This Regulation dictates where main and secondary insolvency proceedings can be opened within the EU (i.e. only where the entity to be restructured has its centre of main interest or an establishment) and provides that once opened, those proceedings have Europe-wide automatic recognition and effect. Many entities have used this Regulation to take advantage of the UK's flexible and sophisticated restructuring laws. Post-Brexit, such a solution may not be available because even if the English court was willing to grant the administration orders, the administrations may not be recognised in the EU (at least not automatically – see below). This is likely to reduce the efficiency of the process and may be detrimental to creditors.

Schemes less likely to be recognised

In the last decade, entities with sufficient connection to the UK have been able to avail themselves of English schemes of arrangement to restructure or reduce their debt, and avoid having to file for formal insolvency in their home Member State. One of the conditions for obtaining the English court's sanction, however, is that the scheme should be recognised and effective in any other relevant jurisdiction, so that creditors in those jurisdictions cannot avoid the effects of the scheme in the foreign courts and gain an unfair advantage over other scheme creditors. This is usually achieved by way of the Brussels Regulation (see Dispute Resolution). However, it is possible (notwithstanding how we think that disputes will be dealt with generally (see Dispute Resolution) that it becomes increasingly difficult to persuade an English court that an English scheme of arrangement will be recognised and enforced in a relevant Member State, especially if the UK chose not to accede to the Lugano Convention for any reason. This could undermine the UK's pre-eminent status in the context of restructuring.

No unilateral solution?

The combination of the Insolvency Regulation, the Brussels Regulation and the Rome Regulations requires all Member States to recognise UK insolvency proceedings, UK judgments and choice of law clauses respectively. The current status quo has, as noted above, meant that the UK has achieved a market-leading profile for insolvency and restructurings. In the event of Brexit, these regulations will cease to apply. However, it may be that Member States

will see this as an opportunity to level the playing field – making it difficult for the UK to achieve consensus as to recognition of insolvency procedures and judgments in this particular area. Leverage may also be difficult to achieve in this area as the issue is not the same in reverse. The UK has implemented the UNCITRAL Model Law on Insolvency (by means of the Cross Border Insolvency Regulations 2006). This gives representatives of foreign main and non-main insolvency proceedings a right to apply to our courts for recognition and request discretionary relief. The relief available is not as powerful as the effects of the Insolvency Regulation but still, it does facilitate cross-border effectiveness for European insolvencies needing assistance from the UK. Unfortunately, only three other (smaller) Member States have adopted it. If more had done so it may have gone some way to ameliorating some of the difficulty highlighted above.

DATA PROTECTION

In the event of Brexit, if the UK was to retain membership of the EEA, there would be little impact on the laws governing the use of personal data, as members of the EEA are subject to existing European data protection laws.

However, if the UK chose not to be part of the EEA, it would then be free to legislate in this area as it saw fit, subject to the terms of any free trade agreement it might enter into. However, the retention of (at least) the core legal principles of the existing regime would offer grounds for the European Commission to rule that a post-Brexit UK provided an adequate level of protection for the rights and freedoms of data subjects, thereby allowing the continued exchange of personal data between the UK and other parts of the EEA. In the absence of such a ruling, businesses established in the EEA would not be able to export personal data to the UK without finding another lawful basis for doing so, such as putting "model clauses" in place, but this could involve an additional administrative burden.

INTELLECTUAL PROPERTY

The impact of Brexit on intellectual property would be complex and depend on the nature of the rights involved. In the case of existing patent law, we would expect Brexit to have a relatively limited effect given that the current European system is established by a treaty which operates independently of the EU (and already extends to territories outside the EEA). However, Brexit would affect the UK's participation in the proposed Unitary Patent (which would be a single patent covering the whole of the EU) and also the Unitary Patent Court (which will determine disputes relating to the Unitary Patent – and one of the main centres for the judiciary is intended to be in the UK). In addition, new laws would be required to allow the territorial scope of Community-wide trademarks (CTMs) and registered designs (CDRs) to continue to include the UK or, if that would not be achievable, the conversion of the CTMs and CDRs into UK registered marks and designs. In the absence of such new laws, Brexit could have a significant effect on businesses which rely on these unitary registrations to protect their intellectual property (and also for financiers who have security over such intellectual property rights). Copyrights would be affected but probably less so given it remains a national right albeit one partially harmonised by a number of international conventions and by a series of EU directives, but the UK would need agreement with the EU to be able to benefit from the proposed Digital Single Market. However the way in which the EU interprets the international exhaustion of rights (as opposed to EU-wide exhaustion) would severely hamper the ability of UK-based businesses to sell into the EU.

If the UK were to retain membership of the EEA, broadly speaking we would not expect there to be a significant impact on domestic intellectual property laws (save in respect of the unitary rights described above), as members of the EEA comply with the EU laws on which much of the UK's current IP legislation is based. Also, the EU doctrine of exhaustion would remain applicable to UK sales into the EU as it applies to all goods placed on the market in the EEA. However, if the UK chose not to retain membership of the EEA, it would be free to legislate in those areas subject to EU laws as it saw fit, subject to the terms of any trade agreement it might enter into with the EU or anyone else. As noted above (see Dispute Resolution), UK courts would no longer be obliged to interpret national legislation in light of relevant EU directives and CJEU jurisprudence – which has had a profound effect in some areas of intellectual property (particularly trademarks and copyrights where the ECJ has complicated the law in an alarming fashion) – meaning even if new laws were not introduced, the UK could well develop divergent views from those adopted in the EU.

Fintech

Technology applied to financial services (Fintech) and regulatory compliance (Regtech) is big business. As we observed recently (see our article – Harnessing the Digital Revolution: The Fintech Challenge), the main challenge to these nascent industries is likely to be the regulatory framework within which these agile businesses must operate, which is cumbersome and relatively rigid when compared to innovations in technology. Many of the legislative requirements relating to financial services are the result of EU directives which must be implemented to their fullest extent (i.e. "maximum harmonisation"). There is currently little scope therefore for UK regulators to adopt an approach that is as flexible and agile as the Fintech providers. Accordingly, Fintech may be one of the few industries which, as a whole, support Brexit if the regulatory shackles to which the Prudential Regulation Authority and Financial Conduct Authority are subject were loosened. However, for the reasons set out below (Financial Services), this nascent industry should not expect a complete free rein even in the event of Brexit!

FINANCIAL SERVICES

The UK is currently Europe's leading international financial centre and leads in most financial services: for example, in cross-border bank lending the UK holds a 17 per cent international market share, compared to 9 per cent for France and 9 per cent for Germany, and hedge fund assets amount to an 18 per cent market share by the UK compared to 1 per cent in France. The UK dominates wholesale financial services and has done so for decades. The UK's membership of the Single Market enables access to the world's largest single market with GDP estimated at €13 trillion and 500 million people and, as the EU financial centre, helps channel capital flows to the economies of Europe. The international nature of financial markets mean that the EU operates within a framework of global standards. An important aspect of the relationship between the EU and the UK is the EU's role in defining the terms of trade in financial services for Member States with other non-EU countries. The EU's single market in financial services has developed within a wider global framework of international standards that have increasingly focused on the safety and soundness of financial institutions (e.g. the Basel Accord). The UK is viewed generally as having a persuasive voice at these global-level institutions, a position which some consider would not be diminished by Brexit. However, there are areas of significant concern and it is arguable that Brexit may have a disproportionate effect on providers of financial services. We would note the following:

Passporting

A key aspect of EU financial services law is the right afforded to a firm in a Member State to carry on a business in another EEA state. This concept, known as "passporting", is a central pillar of the EU Treaty principles. As a result of the advantages that a passport offers to UK firms, London is seen as an attractive centre for international financial services businesses. How passporting firms (in any financial services sector) would be treated post-Brexit would depend on the deal agreed between the UK and the EU. If the UK elected to join the EEA, the passporting regime (whether in respect of banking, investment services or insurance) would be preserved (but the UK would lose its ability to influence future EU legislation in these sectors). However, if the UK elected not to join the EEA, the UK would have to go through the process of applying for a special third country status under each relevant EU directive or regulation (generally referred to as "equivalence") from scratch. For example, under MiFID II, third country firms can provide investment services/activities to eligible counterparties and professional clients within the EU without the establishment of a branch where an equivalence decision has been granted to the third country firm by the EU Commission (amongst other things). This is a time-consuming process, potentially with little political impetus from the EU side and could lead to a considerable delay between the Brexit decision and third country equivalence status being granted (assuming that such a status would be granted in each case, which is not certain).

Supervisory

EU law envisages that "colleges" of supervisors will be established in respect of cross-border EEA banking, investment and insurance businesses. Colleges may include supervisors in non-EEA countries where relevant, and post-Brexit this may include the UK. The co-operation arrangements between supervisors in a "college" are governed by regulatory technical standards and provide for the exchange of information and joint assessment of risk. Third country supervisors, however, are only invited to join the "college" as an observer. If the UK elected not to join the EEA, it may be that decisions would be taken with respect to banking groups without the agreement of UK supervisors. This would likely have an impact on the way cross-border businesses operated within Europe.

Capital

There are other complex issues, particularly under the Capital Requirements Regulation (CRR), to resolve, including in particular whether the EU will assess the UK as an "equivalent" consolidating supervisor for regulatory capital purposes, and whether the UK's general prudential framework is assessed as equivalent for the purpose of the risk-weighting of credit exposures to UK firms. At least, in relation to these matters, the path is relatively clear, even if the outcome is not – except that the UK would almost certainly need to retain most of the CRR rules in order to obtain assessments of equivalence (and certain preferential risk weights). However, even if the UK will in practice be bound to retain much of the CRR rules, it is highly likely that the bonus cap introduced by the CRR (which the UK Government had unsuccessfully sought to annul) will be discarded, assuming it survives its review by the European Commission in 2016. Even if agreement is reached on these and other key issues, there are still likely to be risks for the UK in the post-Brexit model; for example, the European Systemic Risk Board (ESRB), and individual Member States, have rights in certain circumstances to increase the countercyclical capital buffers applying to third country (UK) exposures, which may increase costs for UK borrowers and traders. In some respects similarly to CRD, Solvency II takes into account the rules applicable to a third country and requires the European Insurance and Occupational Pensions Authority to opine on whether the regime in that third country achieves the same outcome as Solvency II. This means that if the UK were to leave the EU and did not accede to Solvency II, an equivalence decision would be required to permit UK insurers to operate in Europe through branches.

Listed issuers

The regulatory framework for listed issuers is likely to remain substantially unchanged should Brexit occur. Listed companies are affected by European legislation in relation to access to capital markets, disclosure of inside information and financial and other reporting. Given that the UK has historically maintained a strict regulatory environment in which listed issuers must behave in a way that is more onerous than EU legislation, it is likely that the regime for disclosing inside information and financial and other reporting will remain the same.

However, there is a high degree of uncertainty with regard to access to EU capital markets post-Brexit. The Prospectus Directive regime has been relatively successful in removing barriers to accessing capital across Europe. It is unclear at this stage whether the UK Government would be able to negotiate a post-Brexit model that would allow issuers to continue to passport FCA-approved prospectuses throughout the EU. The least disruptive outcome would be that the EU accepted the UK framework as equivalent and allowed passporting in the same way. The availability of this option would depend upon there being continuing equivalence of regulation between the EU and UK. In addition, whichever post-Brexit model is chosen, the UK would have very little influence over the manner in which initiatives, such as the Capital Markets Union, develop over time.

RESOURCES AND INFRASTRUCTURE

Upstream oil and gas

The fundamental structure of the UK upstream oil and gas industry and its governing legal regime, including the licensing system, would be unlikely to be significantly affected by Brexit. Responsibility for onshore petroleum licensing is already being transferred to the devolved Governments of Scotland and Wales respectively, and further devolution is unlikely, unless, of course, Brexit propels Scotland to once again push for complete independence from the rest of the UK. The regulatory framework applying to the upstream industry, and in particular environment and health and safety regulation, is highly developed independently of EU law, and any impact is likely to be minor. The offshore decommissioning regime largely stems from international conventions, and would therefore be unaffected. Freed from the strictures of the EU state aid regime (though still subject to WTO rules) the UK Government could choose to support key infrastructure in the UKCS (e.g. pipelines and terminals) necessary to extend the life of the basin.

Gas and electricity markets

The UK's decision to privatise and liberalise its gas and electricity utilities and markets originally came independently of any requirements to do so under EU law. The UK has one of the most competitive and liberalised gas and electricity markets in Europe. Some of the requirements have been shaped by the successive EU "Energy Packages" of Directives and Regulations but the UK Government would be unlikely to change what is, by and large, a well regulated and functioning market. As noted above, the lifting of restrictions imposed by the EU state aid regime may give the UK Government more flexibility in relation to how it structures different support mechanisms for different technologies, targeting those technologies that are in line with current Government policy. Whether this is welcome or not would depend on the relevant sector, because it could, for example, give the Government greater flexibility to discriminate against certain renewable energy technologies (e.g. onshore wind). The removal of EU renewable energy targets could give rise to greater uncertainty for the renewables industry. The UK has its own national targets relating to reduction of emissions, but the EU targets, requiring a specific percentage of electricity to come from renewables, have played an important role in shaping UK energy policy. There may be some regulatory gaps that will need to be filled as a result of EU Regulations and other legal instruments no longer applying to the UK – for example, the new REMIT regime which seeks to prevent energy market manipulation and insider trading. The UK Government would need to decide whether the UK will still participate in the single European gas and electricity market which the EU has been striving to create, and that has been seen as desirable from an energy security point of view. If the UK removes itself from this initiative and its core institutions, this may have a negative impact on arrangements for gas and electricity trading across existing and proposed interconnectors.

Nuclear industry

Brexit has the potential to have a significant impact on the UK's nuclear power regime. The European Atomic Energy Community (EURATOM) has a separate legal personality from the EU, but its Member States and institutions are the same. The Nuclear Safety Directive and Radioactive Waste and Spent Fuel Management Directive, both promulgated under the auspices of EURATOM, form an important part of the international framework that underpins the UK's statutory regime for nuclear power. And the EURATOM Supply Agency plays a key role in the supply of nuclear fuels to Member States. Care would be needed to avoid Brexit having a negative effect on the progress of the UK's nuclear power generation policy.

Built environment

In general, real estate law in the UK is unlikely to change significantly as a result of Brexit. However, it will be important to keep a watching brief on those aspects of EU law that particularly affect real estate such as planning, energy efficiency, construction and environment. Also relevant to investors and cross-border transactions is the EU regulation of investment funds (such as the Alternative Investment Fund Managers Directive). At present London is a very attractive destination for overseas investors and a number of financial institutions and other large companies have their headquarters in London. It is difficult to predict whether Brexit would adversely affect this.

Rail

The fundamental structure of the privatised rail industry in the UK is unlikely to be significantly affected by Brexit as many of the key components pre-date provisions introduced by the EU in its "Rail Packages" legislation. In any case, the UK Government is looking at the structure and financing of Network Rail in the upcoming Shaw Report so change is likely whether or not it is accompanied by Brexit.

It is likely that the rules governing capacity allocation which, amongst other things, provide opportunities for open access operator entrants to the UK's railways would remain in place in the event of Brexit. The position is more likely to be affected by the current consultation by the Competition and Markets Authority into rail competition and upcoming decisions on capacity allocation to be made by the Office of Rail and Road regarding the East Coast Main Line.

The EU's rail interoperability regime is complex and wide-ranging, with detailed Technical Specifications for Interoperability (TSIs) applying to most suppliers of rolling stock and other subsystems. These TSIs were introduced by the EU as part of the move towards a single European railway system. Brexit would be likely to remove the European Rail Agency's mandate. The Rail Safety and Standards Board and other regulatory bodies would then be able to set and amend standards themselves.

In the event of Brexit, the UK may choose not to be subject to the emissions regulations which affect the manufacture of diesel trains. The current European regulations are affecting the market for such trains.

All transport and infrastructure sectors

In the event that the UK did not retain membership of the EEA, the removal of EU public procurement and State Aid rules may allow the UK Government to reframe the parameters of public procurement to provide incentives to support certain sectors such as the domestic rail industry. It is probable that the UK Government would revisit some of the changes introduced by Eurostat's ESA 2010 regime, and in particular the guidance on what PPP projects are classified to the public sector, in order to regain some control of what counts as national debt.

It is unlikely that funding from the European Investment Bank for greenfield projects will decrease significantly as the EIB will still have its mandates to promote the transport and broadband networks across Europe and regularly invests in countries outside the EU.

The UK Government may take the opportunity to revisit some of the environmental legislation emanating from Brussels that has driven increased activity and costs in certain sectors, such as the landfill and waste water directives.

Ashurst Partners – A European perspective

ROB AIRD, PARTNER – LONDON

"It is not clear what withdrawal from the EU will actually mean in practice for business. What is clear is that the uncertainty as to what a post-Brexit world will look like means that assessment of risk and forward planning for businesses is very challenging.

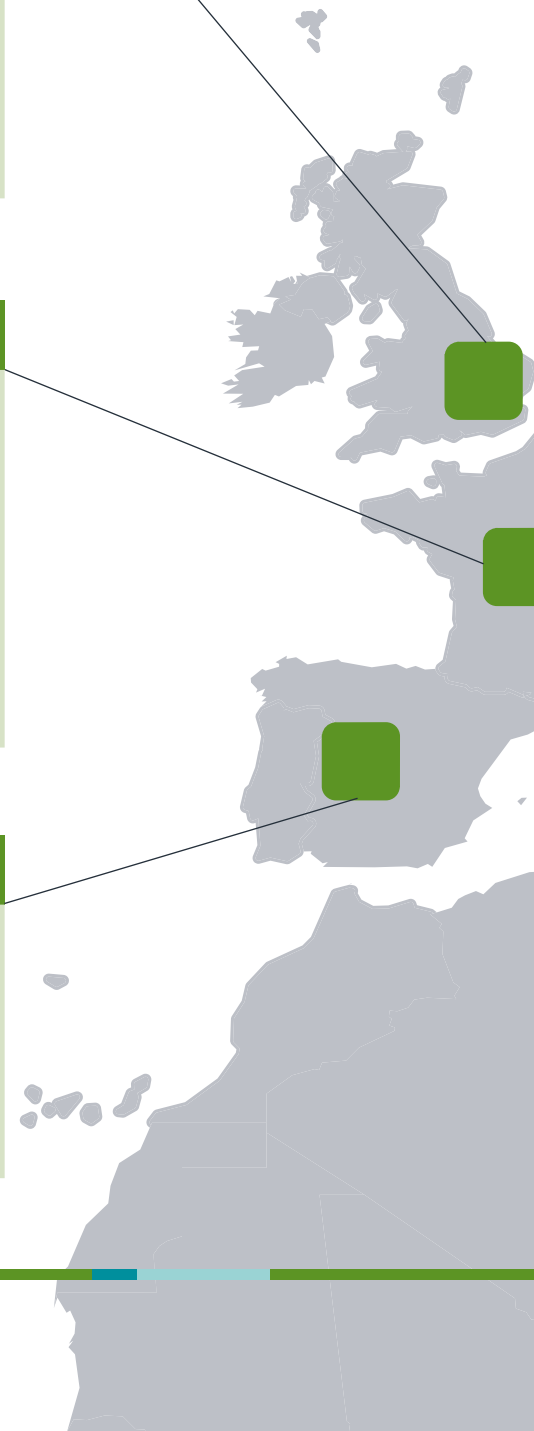
Worryingly, it appears that voters will not be given a full picture of the implications for the UK outside the EU when they go to the polls in June. The UK public could vote to leave the EU without truly understanding the long-term implications of that decision on the economic and political landscape of the UK."

PHILIPPE NONE, PARTNER – PARIS

"In my view, the political drivers behind the Referendum in the UK are stronger than the economic ones on both sides of the Channel. The EU began life as an economic union but has, over six decades, seen significant integration far beyond a free trade area. Calls for ever closer union have prompted many people across the EU to challenge the direction in which the EU is heading. The UK Referendum is a democratic process which may result in a period of political and economic instability across the remaining Member States as well as the UK, irrespective of the result."

EDUARDO GRACIA, PARTNER – MADRID

"From a Spanish angle, I think there are two areas of concern: how to manage the huge number of tourist and resident British citizens annually coming to Spanish territory if they become "third country" visitors and the legal and tax framework that would apply regulating the significant amount of bilateral foreign direct investments going forward."



CARL MEYNTJENS, PARTNER – BRUSSELS

"According to recent studies, in the event of Brexit, Belgium would have a significant exposure, given its close economic ties and trade relations with the UK. Losses are predicted to vary between 0.2 and 1% of GDP by 2030."

JON ERICSON, PARTNER – STOCKHOLM

"The UK is the fourth largest export market for Swedish industry and access to UK capital markets is considered important for Swedish issuers. Therefore, there is a concern that Brexit would have a negative impact for many Swedish companies. Further, the UK is considered as an important ally of Sweden within the Union."

TOBIAS KRUG, PARTNER – FRANKFURT

"From a political standpoint, Germany may be affected by the loss of the UK as a counterweight to France in policy debates. Furthermore, it might be harder to assemble a blocking minority or to act as the swing state in regulatory debates. Germany may also be forced to play a bigger part in the Common Foreign and Security Policy.

A positive economic impact could result from a relocation of headquarters of non-EU firms from the UK to Germany due to regulatory limitations they might experience in the UK becoming a "third country". The German trade surplus with the UK (over €28bn in 2013, which equals 1% of German GDP) could shrink significantly according to higher customs, taxes and transaction costs. In addition, 40% of German investment in the UK is in the transportation and storage sector, its future in the event of Brexit remains highly unclear; it could result in the repatriation of some of those operations back to Germany."

ISABELLE LENTZ, PARTNER – LUXEMBOURG

"Brexit will have an important impact on Luxembourg's economy. However, as a consequence of Brexit, some UK businesses in the finance sector may be relocated to other European cities. As one of the European financial centres, Luxembourg might therefore ultimately benefit from Brexit. Like Singapore and Hong Kong, Luxembourg is a small, stable, multicultural state with a solid institutional framework which might attract UK based international players to use Luxembourg as their new European distribution gateway."

Concluding remarks

Brexit is likely to impact business both in the UK and EU. The extent of the impact will largely depend upon the nature of the ongoing relationship between the UK and the EU governing how firms will continue to access markets on a cross-border basis. It will also depend on the extent to which the UK continues to apply regulation that is derived from the EU.

It will be important for UK businesses to continue to have access to the internal market of the EU with as little disruption as possible in the event of Brexit.

What is clear is that going forward, the UK post-Brexit would have very limited ability to influence EU policy and legislative change and may need to retain or adopt legislation domestically in order to carry on business in EU Member States in the future. If the UK were required to maintain EU standards in order to continue doing business with the EU, this would leave it in the unfortunate position, as is currently the case with Norway and Switzerland, of having to implement EU regulation without any ability to influence the legislative process.

Ashurst contacts

Ashurst has formed a Referendum Thought Leadership Group that has been considering the key issues for business arising out of the Referendum and a possible Brexit.

For further information, please do not hesitate to contact your usual Ashurst contact or any of the partners detailed below.

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