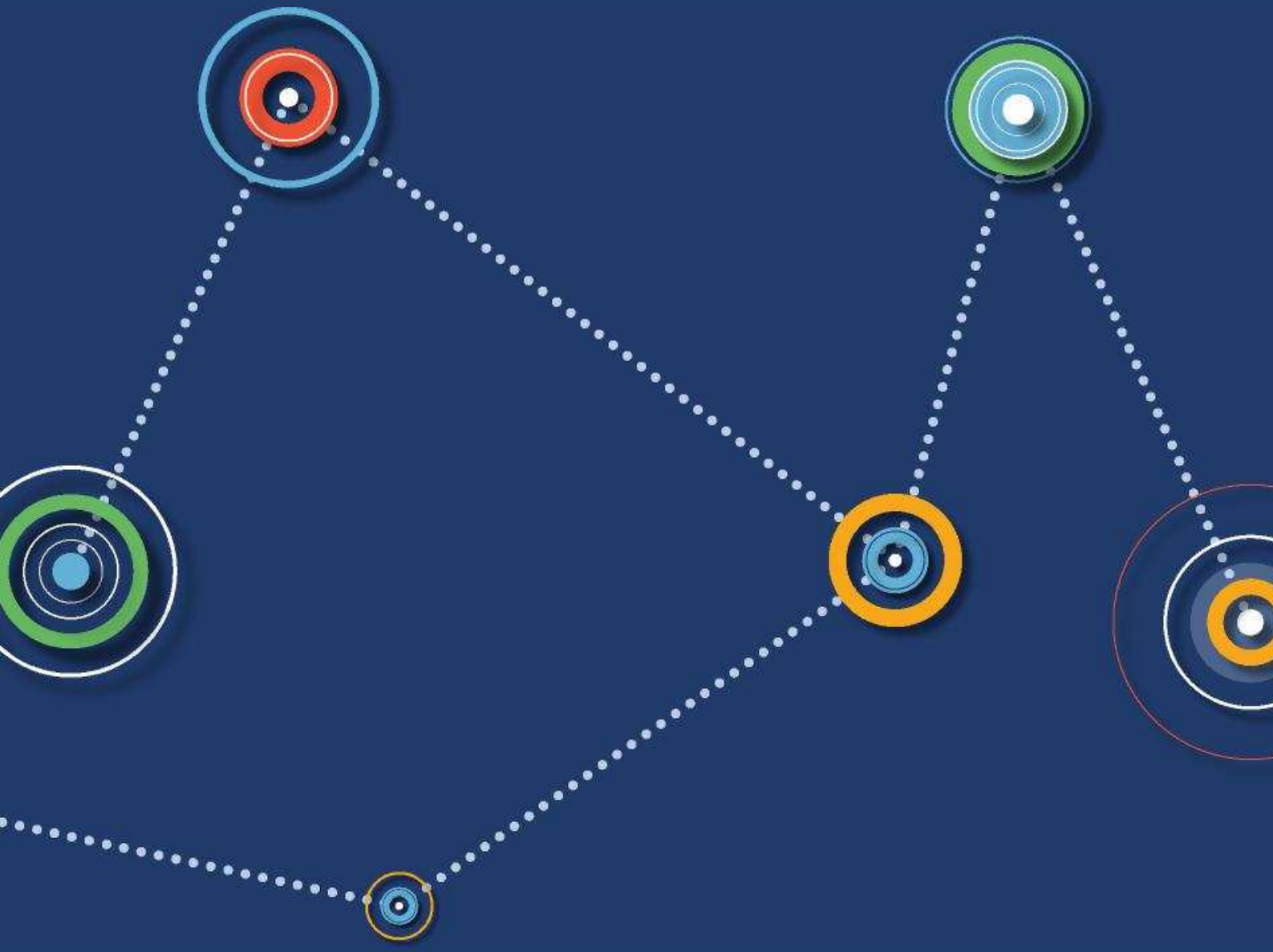
Freshfields Bruckhaus Deringer

Brexit

Impact on your business



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Impact on your business

The Brexit vote presents a host of questions, challenges and opportunities.

The vote has rejected the status quo but does not indicate what will replace it. The UK and the EU will now need to negotiate the UK's exit and decide on the nature of their future relationship.

For business there is a lot at stake. There are huge differences between something like the Norwegian model on one hand and reliance solely on rights and obligations under World Trade Organization rules on the other. If a bespoke free trade agreement is preferred, decisions will need to be made about how deep and comprehensive it should be. All this will have to be negotiated.

In the short term, there are also questions about the Brexit process. Will the UK trigger the official Article 50 withdrawal process by giving the EU notification of its intention to leave? If so, when, and who gets to make that decision? Will the UK continue to comply fully with its EU treaty obligations until it leaves, or will it be prepared to breach some of those obligations (for example on immigration) in order to achieve immediate results?

These uncertainties are affecting share prices, exchange rates, interest rates, credit ratings and commercial relationships. In a competitive environment, some companies will have been weakened by the vote; others strengthened.

Events may move quickly and you must be prepared to meet basic business continuity challenges.

Brexit business advice

What can you do now to protect yourself, influence or take advantage of the new reality? How are your competitors, customers and suppliers likely to be affected? Are there good deals to be done, or defences to be prepared? At Freshfields we are helping our clients answer these questions – to reduce uncertainties, assess risks and seize opportunities. Some of our clients have been thinking about how to deal with Brexit for a while. Others are just beginning. Some of our insights on potential consequences of Brexit are below – you can also sign up here for regular updates on Brexit developments.

Your capital and finance

Current state of play

Prospectus approval

- Companies that want to offer shares or bonds to investors in the European Economic Area (EEA), or to list them on an EEA 'regulated market', can do so with a prospectus approved in one member state.
- Regulators in other EEA jurisdictions cannot require a company with a prospectus approved by one member state to meet additional requirements before offering or listing shares or bonds (other than a translated summary).

Offering into, or listing in, the EEA

- There are circumstances in which companies are exempted across the EEA from preparing a prospectus to offer or list shares or bonds. For offering this includes when they offer to any number of qualified investors in the EEA and up to 150 retail investors in each member state.
- Outside these exemptions, companies wishing to offer shares or bonds to retail investors around the EEA – or to list on a regulated market in the EEA outside the jurisdiction that approved their prospectus – can use a streamlined system to 'passport' their approved prospectus into any EEA jurisdiction.

Prospectus content

- Prospectuses must follow the same content requirements – including, for equity and retail debt, a detailed 'summary' – regardless of where they are approved in the EEA or whether they relate to an initial or secondary offering or listing.

UK listings

- The UK has 'gold-plated' certain EU requirements, which means companies seeking a premium listing of shares must comply with super-equivalent eligibility and continuing obligations. It is possible however to seek a 'standard' listing of shares or bonds in the UK on an EU directive minimum basis.
- Certain rules mean it is easier for EEA companies to list in London than it is for companies incorporated elsewhere in the world, for example in relation to the 'free float' needed. Shares held by investors in the EEA are included in this 25 per cent 'public hands' requirement, meaning investors located in an EEA company's home jurisdiction count towards this threshold. It is at the discretion of member states whether they also include investors located outside the EEA.

Continuing obligations

- There is a single set of disclosure and transparency rules for companies listed on a regulated market anywhere in the EEA, which means those with dual listings do not have to comply with separate obligations in more than one member state.

Future reform

- The EU is currently consulting on reform of the Prospectus Directive and the capital markets generally, including proposals to take further steps towards a true capital markets union.

What should I be thinking about now?

Prospectus approval

- Will EEA member states recognise prospectuses approved by the UK? Will this continue even if future content requirements diverge? If not, will a company wanting to offer into or list in both the UK and the EEA need to get a prospectus approved both in the UK (for UK offers or listings) and by a further regulator in its EEA 'home member state' (to benefit from an EEA-wide passport)?
- Will the UK continue to recognise prospectuses approved by EEA member states? If not, what will be the process to 'passport in' to the UK?

Offering into, or listing in, the EEA

- Will the UK continue to work to the prospectus exemptions that apply in the EEA?

Prospectus content

- Will the UK amend its prospectus content requirements to make it easier for me if I want to do a follow-on issue or subsequent listing?

UK listings

- Will the UK amend its 'standard' listing category so it is subject to different eligibility or continuing obligation requirements, for example by lowering the 'free float' requirement? Will these make it easier, or more difficult, to list or maintain a standard listing?
- Will EEA companies find it more difficult to list in the UK, for example because investors located in their home EEA jurisdiction will be treated on a 'third country' basis and not routinely included in 'free float' calculations?
- What will the impact be on liquidity in the London market, for example where investors are required to invest in EEA-regulated market securities? Will London be a less attractive venue?

Continuing obligations

- Will compliance with UK financial reporting, major shareholding notifications and general information requirements be recognised as 'equivalent' by EEA member states, or will UK/EEA dual-listed companies need to comply with two sets of obligations?
- Even if the UK is 'equivalent' initially, how likely is it UK/EU standards will diverge over time?
- Where compliance with two sets of rules is required, how will this work in practice? Will it be possible to make one announcement to meet both UK and EU requirements?

Future reform

- If the EU does update the Prospectus Directive, or takes further steps towards capital markets union, will the UK update its rules or will standards diverge?

What could the position be following a Brexit?

The answers to many of the above questions would depend on the nature of a post-Brexit UK/EU relationship.

To give an idea of the range of possible outcomes, we have considered what the position would be under the Norwegian option and the World Trade Organisation (WTO) option – on the basis that these are at opposite ends of the spectrum of existing models for an alternative relationship with the EU.

What if the UK left the EU, joined the European Free Trade Association and remained a member of the European Economic Area (EEA)? (the Norwegian option)

If the UK remains in the EEA, there will be no change to current arrangements for the approval of prospectuses, the availability of prospectus exemptions, the ability to passport prospectuses or the application of continuing obligations for listed companies. The UK would, however, be less well-placed to shape future changes in the rules, while still being obliged to implement amendments agreed by the EU.

What if the UK left the EU without any form of free trade agreement? (the WTO option)

Prospectus approval

Current rules in the UK and the rest of the EEA allow a national competent authority to approve a prospectus that has been drawn up in accordance with international standards set by international securities commission organisations. This power could be used by competent authorities to approve prospectuses approved in the UK, and vice versa in the UK to approve prospectuses approved in the EEA, effectively allowing a prospectus to be 'passported' in or out on similar terms to the current system. This is currently an individual EEA jurisdiction decision. However, unlike the present position, neither the UK nor the rest of the EEA would be obliged to recognise prospectuses approved by the competent authorities of other member states, and the 'passporting' of prospectuses would, therefore, no longer be assured.

Continuing obligations

A company with listings in London and on an EEA-regulated market could be required to comply with both UK and EEA continuing obligations in relation to financial reporting, major shareholding notifications and general information requirements. The Transparency Directive does, however, allow national competent authorities to exempt non-EEA issuers from these requirements if, broadly, they comply with the requirements of the law of a non-EEA state that the relevant national competent authority considers as equivalent. It may be possible, therefore, for individual EEA regulators to decide that UK companies with a listing both in the UK and on an EEA-regulated market need not comply with such rules in their EEA home member state.

While the UK rules on financial reporting, major shareholding notifications and general information requirements currently only apply to companies with a London listing that have the UK as their home member state, it seems likely these rules will be amended so they continue to apply to UK-incorporated companies if Britain were to leave the EU. As with prospectus approvals, however, there would be no automatic exemption from EEA continuing obligations for UK issuers complying with UK requirements.

Your competition compliance

Immediate implications of the Referendum result

- As regards merger control, in the event that the UK does not reach an agreement that sees continued application of the EU Merger Regulation, then many deals will become subject to parallel review by the Competition and Markets Authority (CMA) in the UK, whereas previously they would have benefited from the "one stop shop" principle applicable to EU filings made in Brussels. The CMA's approach is typically very thorough, and deals that are subject to such an approach may therefore face materially greater regulatory burdens.
- Until the negotiation outcome is implemented, UK competition law will remain unchanged – both UK and EU competition and merger control law, as well as State aid law, will continue to apply in the UK. In many respects, UK competition law mirrors EU law in any event – particularly in cartel enforcement and abuse of dominance law. To this extent, the rules applicable to businesses will not change significantly, although who enforces them may do – and there may be less need to adopt a consistent approach with the way EU law develops in the future.
- Bigger questions remain about what, if any, equivalent to current EU State Aid law would be enacted to apply in the UK, governing whether failing industries could be bailed out.
- The current state of play (below) remains applicable until such a time as the UK leaves the EU/EEA.

Current state of play

- EU competition law supports the completion of the EU-wide single market by providing a unified legal framework and common processes across the 28 member states.
- The EU's general antitrust rules prohibit cartel conduct and abuse of a dominant market position.
- The European Commission and the national competition authorities (NCAs) of EU member states can investigate and impose substantial fines (up to 10 per cent of worldwide turnover) for breaches of these rules.
- If the Commission or an NCA establishes that there has been a breach of EU antitrust rules, the parties concerned can be exposed to third-party actions for damages in national courts within the EU.
- A new Damages Directive is being implemented across the EU, which is designed to further harmonise the approach of national judicial systems to such actions.
- The EU Merger Regulation provides a one-stop shop for the regulation of proposed mergers, acquisitions or joint ventures involving companies operating in Europe (where the parties concerned meet certain worldwide and EU-wide thresholds).
- 'State aid' by member states, which can operate as a form of protectionism to the detriment of other undertakings or products, is tightly controlled as it has the potential to distort normal market competition.

What should I be thinking about now?

- Given that the UK has adopted national legislation (the Competition Act and Enterprise Act) that run parallel to the EU provisions, a Brexit is unlikely to change the fundamentals of competition regulation in the UK.
- Indeed in certain respects (eg in relation to private actions), the UK is a frontrunner, with many of the measures sought by the EU in its new Damages Directive (eg disclosure obligations) already a feature of UK law and procedure.
- The adoption of the UK Consumer Rights Act in 2015, which establishes, among other things, an opt-out class action regime for competition damages, demonstrates an ongoing commitment at national level to effective competition regulation and enforcement.
- As far as mergers are concerned, companies will still need to be cognisant of the EU thresholds and will remain subject to EU regulation in cross-border deals. In any event, if the UK were to remain part of the European Economic Area (EEA), post-Brexit, very little will actually change in terms of the obligations of UK undertakings, including in relation to merger control.
- Nevertheless, a Brexit will inevitably raise substantive and procedural legal issues as the UK regime is decoupled from EU standards, processes and enforcement.
- How would post-Brexit transitional arrangements affect a company's potential liability for (pre-Brexit) breaches of EU antitrust rules?

Enforcement

- What effect would Brexit have on the way in which my business is regulated?
- Will my business need to adapt compliance strategies in dealing with the Competition and Markets Authority (CMA) or other national regulators with concurrent competition powers (eg the Financial Conduct Authority or sectoral regulators such as OFGEM), which may have different powers and enforcement priorities to the European Commission, and will become more prominent following Brexit?
- Will the risk of diverging views on enforcement between the UK and remaining member states due to the absence of the UK from the European Competition Network lead to uncertainty for my business?

Private actions

- What status will European Commission or EU NCA decisions have in domestic tribunals?
- Will the UK remain a popular forum for follow-on damages claims?
- Will I be able as readily to enforce rights in Europe if the jurisdiction rules and rules on recognition and enforcement of judgments change?
- What effect would a Brexit have on opportunities to benefit from EU or UK leniency programmes, given the withdrawal of access to the EU's 'one-stop-shop' approach to leniency?

M&A

- How will Brexit affect my business' corporate strategy in relation to any significant M&A activity in the medium term? What are the

implications of a dual-track process requiring notification in the EU and the UK? What extra hurdles will we need to navigate?

State aid

- Will the UK have greater political freedom to support 'national champions'?
- Are there implications for sectoral or regional growth initiatives?
- Is there a risk that, without a direct ability to access EU complaints processes, UK companies may be disadvantaged against EU-based competitors following a UK withdrawal from the EU?

Overarching policy and practical considerations

- Will the absence of a UK voice within the EU at political and civil-service levels alter the direction of travel of competition policy (eg the promotion of a more protectionist approach)?
- How would my legal and compliance strategies need to change to ensure the appropriate protection of privileged communications, and so as not to be disadvantaged by the loss of rights of audience before the EU courts?

What could the position be following a Brexit?

The answers to many of the above questions would depend on the nature of a post-Brexit UK/EU relationship.

To give an idea of the range of possible outcomes, we have considered what the position would be under the 'Norwegian option' and the 'World Trade Organisation (WTO) option' – on the basis that these are at opposite ends of the spectrum of existing models for an alternative relationship with the EU.

The Norwegian option

- Under the Norwegian option, the UK would join the European Free Trade Association (EFTA) and remain part of the EEA.
- The UK would be bound by the EEA Agreement (which replicates the EU rules on competition law). The content of the competition law applied in the UK would remain broadly identical following Brexit.
- The CMA and the UK courts would apply the equivalent rules under the EEA Agreement along with domestic UK competition law (which is heavily modelled on EU competition law).
- A merger between a UK company and an EU company would still be susceptible to a merger review by the European Commission. Other mergers may still be subject to review by the EFTA Surveillance Authority (ESA) if they involve EFTA countries, although this has yet to happen in practice. The same concept applies to cartel and dominance cases: a UK company could be susceptible to a European Commission investigation if the relevant conduct occurred substantially in a EU member state rather than an EFTA state.
- The enforcement powers of the EFTA Surveillance Authority are the same as those of the Commission.
- In cartel cases where the Commission has jurisdiction, the Commission immunity and leniency regime applies to EFTA states as if they were EU states, meaning that EFTA states could approach the Commission directly. In cartel cases where the ESA has jurisdiction,

the ESA has adopted a Leniency Notice. This echoes the Commission regime with the intention of ensuring uniform application of EEA competition law across EU and EFTA states. Therefore, the possibility of immunity from or a reduction in fines for cartelists would remain open under the Norwegian option.

- EFTA states are subject to the EFTA Court, which is the EFTA equivalent of the Court of Justice of the EU. It deals with cases and appeals between the ESA and EFTA states, handles disputes between EFTA states and gives advisory opinions to EFTA states on the interpretation of EEA rules.

The WTO option

- Under the WTO option, the UK would leave the EU without any free trade agreement in place. It would instead rely solely on rights and obligations under WTO rules.
- The WTO does not have a formal competition regime. It does, however, continue to apply rules under the General Agreement on Tariffs and Trade in relation to state subsidies. These rules are similar to the EU state aid rules. However, the WTO regime is slightly narrower and may only be enforced by WTO member states (ie not by private parties directly). As such, the WTO regime is less interventionist than the EU rules.
- Leaving aside state subsidy regulation, competition policy following Brexit would be determined at national level, potentially supplemented by bilateral trade agreements with competition-relevant provisions or protections.
- There would, therefore, be the prospect of a dual track emerging – companies active in both the UK and the EU would be susceptible to regulation by both UK and EU authorities pursuant to separate UK and EU rules. In the absence of co-ordination between relevant regulators and courts, businesses may become subject to parallel filing obligations and could face parallel investigations that apply both potentially divergent legal standards and separate fines in relation to connected conduct. This clearly risks raising compliance issues and costs for businesses.

Your contracts

Current state of play

The Rome I Regulation sets out the rules that the English courts apply to determine which law applies to your contractual obligations. Under this Regulation, a contract is normally governed by the law chosen by the parties.

However, your agreed choice of law can be displaced in the following situations:

- where there are mandatory legal rules in the place where the dispute is being heard, or in a country connected to the dispute (one example here would be laws on employee rights); and
- where some provisions of the law chosen by the parties are clearly incompatible with public policy in the country where the dispute is being heard (for example, where performance of an act would be illegal).

Where the parties to an agreement have not expressed a choice, the Rome I Regulation sets out specific rules to determine the governing law for certain types of contract. In general, this will be the law of the country where the party who is to carry out the contract is habitually resident.

Other obligations

- The Rome II Regulation sets out the rules that the English courts apply to determine which law applies to your non-contractual obligations.
- Under this Regulation, the law that applies to non-contractual obligations is normally the law of the country where the damage occurs.
- You are also entitled to specify in your contracts the law that will govern non-contractual obligations.

What should I be thinking about now?

- What rules on the governing law might apply in the event of a Brexit? Will the choice of English law to govern my contracts still be valid? What about contractual provisions that say English law will govern non-contractual obligations as well?
- Will a choice of English law in an agreement still incorporate EU law following a Brexit? If not, will the choice of English law remain valid if a key provision of the contract derives from EU law?
- If I do business from or with the EU, what should I do if I still wish EU-derived law to govern my contractual obligations? Should I consider adopting a governing law of a continuing member state of the EU?

What could the position be following a Brexit?

The answers to many of the above questions would depend on the nature of a post-Brexit UK/EU relationship.

To give an idea of the range of possible outcomes, we have considered what the position would be under the 'Norwegian option' and the 'World Trade Organisation (WTO) option' – on the basis that these are at opposite

ends of the spectrum of existing models for an alternative relationship with the EU.

What if the UK leaves the EU but joins the European Free Trade Association and remains part of the European Economic (EEA)? (the Norwegian option)

- A choice of English law to govern contractual relationships should still be recognised by courts in both the UK and EU member states. The relevant English law rules would be those set out in the Rome Convention. This is similar to the Rome I Regulation, which does not bind EEA countries but would continue to be applied by the courts of EU member states.
- A choice of English law to govern non-contractual obligations will continue to be upheld by the courts of EU member states. In this scenario, the Rome II Regulation would apply. However, the position would be less clear under English law as, before the Rome II Regulation regime came into effect, parties did not have an express right to choose which law applied to non-contractual relations between them. (The Rome II Regulation does not bind EEA member states either.)
- The UK's obligations under the EEA Agreement would ensure that EU legislation would continue to be incorporated into English law, but only as regards those matters covered by the EEA Agreement.

What if the UK leaves the EU without any form of free trade agreement? (the WTO option)

The same position as for the Norwegian option would apply here, except that the UK would not have to incorporate EU legislation into English law.

Your data

The current state of play

Regulatory framework

The data protection framework in the EU is based on the Data Protection Directive. Although member state regulation is based on this directive, domestic laws and, in particular, respective enforcement practice differ to some extent from one state to another.

A higher degree of harmonisation in EU data protection standards will be achieved by the upcoming General Data Protection Regulation (GDPR), which will most likely come into force in 2018. The GDPR will be directly applicable in all member states, and will introduce fines at a level similar to antitrust regulations in the EU. It will have a broad scope of application as it will also cover data processing outside the EU if such processing is related to the offering of goods or services to data subjects in the EU.

Collection, processing and transfer of personal data

EU data protection regulation is based on the principle that any collection, transfer or processing of personal data requires a legal justification (eg the data subject's consent, overriding legitimate interests of the data controller or regulatory requirements).

Transfer of data outside the EU

The transfer of personal data outside the EU is subject to additional requirements. In most cases, this is only allowed if the country where the recipient of the data is located is regarded as a 'safe third country' by the European Commission.

Commissioned data processing

Under certain circumstances, transfers of personal data to so-called data processors (eg server hosts or certain providers of software or cloud computing) do not require a legal justification. However, this exemption only applies for commissioned data processing within the EU. If a data processor is located outside the EU, transfers to it of personal data still require a legal justification, even if the parties sign up to a data processing agreement and agree to ensure compliance with EU data protection regulation.

What should I be thinking about now?

Data processing outside the EU

An important question is whether, after a Brexit, the UK would be classified as a 'safe third country' by the Commission, so as to permit EU personal data to be transmitted to the UK. If it were not, UK companies doing business in the EU would need to re-think their data protection compliance strategy.

Commissioned data processing

Cross-border data flows to data processors in the UK that do not currently require a legal justification might require a particular justification in case of a Brexit. Without such justification, changes to data flows may become necessary. This would be especially burdensome if the data processor plays a role as a data processing hub within a group structure with headquarters or subsidiaries in the EU.

Applicability of EU data protection regulation

What would the UK data protection regime look like following a Brexit? To what extent would the UK want to retain the regime based on the Data Protection Directive or the GDPR changes? Would a negotiated post-Brexit UK/EU relationship involve the UK keeping in step with the EU in this area?

What could the position be following a Brexit?

The answers to many of the above questions would depend on the nature of a post-Brexit UK/EU relationship.

To give an idea of the range of possible outcomes, we have considered what the position would be under the 'Norwegian option' and the 'World Trade Organisation (WTO option)'– on the basis that these are at opposite ends of the spectrum of existing models for an alternative relationship with the EU.

What if the UK leaves the EU but joins the European Free Trade Association and remains part of the European Economic Area (EEA)? (the Norwegian option)

The four freedoms as laid down in the Treaty on the Functioning of the European Union (ie the free movement of goods, services, persons and capital, as well as competition and state aid rules) are incorporated in the EEA Agreement. This means that:

- the Data Protection Directive applies throughout the EEA. Hence, nothing would change since the UK would still have to comply with this directive; and
- the upcoming GDPR would have an immediate effect on UK-based companies.

What if the UK left the EU without any form of free trade agreement? (the WTO option)

- The UK would be free to revise its data protection framework and deviate from EU standards.
- The upcoming GDPR would have no direct effect on the UK.
- Depending on future revisions to UK data protection law, the Commission would have to designate the UK as a 'safe third country'. If it didn't, data transfers to the UK would be subject to stricter requirements, like data transfers to the USA, for example.

Your disputes

Current state of play

There is currently one set of rules governing which country should have jurisdiction in a dispute, and the recognition and enforcement of civil and commercial court judgments between member states. The general rule is that the courts of the member state where the defendant is domiciled have jurisdiction. This is subject to a number of exceptions, including:

- where the parties have agreed that the courts of another member state should have jurisdiction;
- cases involving a particular subject matter where the courts of a member state have exclusive jurisdiction (for example, real estate); and
- cases involving employment contracts, consumer contracts or contracts of insurance.

Parallel proceedings in the courts of more than one member state are prohibited where those proceedings involve the same or related issues.

There is mutual recognition and enforcement of judgments between member state courts subject to limited exceptions.

What should I be thinking about now?

- Do I need to think about amending jurisdiction clauses in agreements conferring jurisdiction on the English courts?
- I do business in the EU from the UK. All of the contracts with my clients are subject to the exclusive jurisdiction of the English courts. What can I do to make service of English proceedings as straightforward as possible if a Brexit occurs?
- Should I be concerned that English judgments will no longer be as easily enforceable in the EU in the event of a Brexit, and if so is there anything I can do about it?
- I am based in Germany and regularly deal with customers in the UK. If I successfully sue any of my customers in the German courts, will I be able to enforce the resulting judgment in the UK if it leaves the EU?
- As a US business operating in a number of EU countries, including the UK, should I be concerned at the risk of parallel proceedings if I sue an Italian counterparty in England? Would it make enforcement of judgments easier if my business' contractual arrangements were subject to the jurisdiction of a member state other than the UK?

What could the position be following a Brexit?

The answers to many of the above questions would depend on the nature of a post-Brexit UK/EU relationship.

To give an idea of the range of possible outcomes, we have considered what the position would be under the 'Norwegian option' and the 'World Trade Organisation (WTO) option' – on the basis these are at opposite ends of the spectrum of existing models for an alternative relationship with the EU.

What if the UK leaves the EU but joins the European Free Trade Association and remains part of the European Economic Area (EEA)? (the Norwegian option)

It is likely that the UK would sign up to the Lugano Convention, which currently applies to the EU, Switzerland, Norway and Iceland. This is similar to the current EU regime and as a result there would be no significant change in this area.

What if the UK leaves the EU without any form of free trade agreement? (the WTO option)

If the UK did not become a member of the EEA, it could still seek to sign up to the Lugano Convention (see above). It could also seek to sign up to the Hague Convention on Choice of Court Agreements, which provides a similar regime and is currently in force between the EU and Mexico.

In the absence of any agreement with the EU on jurisdictional matters, English courts are still likely to respect provisions in contracts that confer jurisdiction by agreement on the English courts.

The question of how such clauses will be treated by EU member states in this scenario will be a matter for the laws of those member states.

Finally, in the absence of any agreement with the EU, the enforcement of English court judgments in the EU is likely to be significantly more complex than at present.

Your environmental obligations

Current state of play

- European regulatory initiatives dominate UK environmental legislation. Mostly, these take the form of EU directives, which the UK has implemented into domestic law. A Brexit would not automatically undo such domestic rules – depending on the nature of the post-Brexit UK/EU relationship, the UK may be free to change them. That said, many EU environmental and nature conservation directives are drawn from international conventions and standards. The UK would therefore either have to reformulate its own rules within the requirements of these regimes, or it would need to withdraw from its international commitments.
- However, some EU legislation – such as the regime governing chemicals – takes the form of directly applicable regulations, for which implementing domestic laws are not required. If the UK left the EU, it would need to deal with this regulatory gap immediately. Whichever way the UK addressed this, UK exporters of chemicals to the EU would still have to comply with the existing EU regime.

New commercial, industrial or infrastructure projects

- The development of large or environmentally significant facilities requires a comprehensive Environmental Impact Assessment (EIA), which is an EU requirement transposed into domestic law.
- Rules relating to contaminated land and groundwater comprise requirements originating in both European law and domestic law.
- Similarly, a lot of important legislation protecting biodiversity, habitats and wildlife is European in origin. ◦UK regulations and guidance regarding energy efficiency flow from EU directives.
  - EU rules dictate how the UK is required to meet the 'access to environmental justice' requirements of the Aarhus Convention, and allow objectors to challenge UK project consents in EU courts.
  - Some large projects are directly driven by a need to meet EU standards under threat of massive fines for infraction, such as the £4.2bn Thames Tideway Tunnel, developed principally to comply with the Urban Waste Water Treatment Directive.

Operating industrial or commercial facilities

- Operators are required to obtain comprehensive environmental permits that regulate discharges to the environment and waste disposal. This regime is very closely based on requirements in the EU Industrial Emissions Directive.
- Best Available Techniques Reference Documents (BREFs), produced in an EU-facilitated process, have to inform the operating permissions given by national authorities.
- Environmental permitting requirements significantly impact on UK industry. For example, sulphur and nitrate emission limits taking effect in 2016 and 2023 directly determine the asset life of the entire UK fleet of coal-fired power plants, and many of the older gas plants.

Chemicals

- The EU Regulation on Registration, Evaluation, Authorisation and restriction of Chemicals ('REACH') places obligations on manufacturers, importers to the European market, and European downstream users.

Energy and power supplies

- The EU Emissions Trading System (EU ETS) requires energy-intensive facilities to hold EU emission allowances permitting them to emit certain quantities of carbon dioxide. These allowances are tradable and tracked in a central EU registry.
- EU competition law limits the extent to which the UK may subsidise or incentivise investment in low carbon energy infrastructure.
- The UK participates in EURATOM, Europe's civil nuclear energy community, which is governed by EU institutions.

What should I be thinking about now?

Project development

- Post-Brexit, what would be the status in the UK planning and environmental permitting process of guidance, best practice and BREFs published by EU institutions?
- If I am planning a complex consenting strategy for a large, long-term project, how could I design a robust EIA and permitting process that met the requirements of current and future regimes?
- If EU biodiversity and conservation designations affect my land or project, might a change to the domestic regulatory regime change development opportunities?
- How would an EIA in another European country treat cross-border effects on the UK and vice versa?
- What would be the future of projects specifically developed to meet EU standards?
- Would the UK reform its project consenting rules post-Brexit to streamline public consultation processes or reduce the scope for third party challenges?
- Is it likely that the UK would lower the environmental and consultation requirements of project development to an extent that would be significant for consenting timelines?

Chemicals

- If REACH ceased to apply in the UK, would the UK substitute a different regulatory approach, resulting in fractured compliance obligations for companies manufacturing, importing or using chemicals in both the UK and the EU?
- Would compliance with EU standards ensure compliance with any reformulated UK requirements?

Energy

- Would the UK leave the EU ETS and, if so, would additional domestic measures be brought in to ensure UK compliance with international and domestic climate change commitments?

- In absence of EU competition laws, would the UK's support for its low-carbon electricity sector change?
- Would the UK change EU (non-carbon) emissions limits for fossil fuel power plants, prolonging their life-spans?
- Would a Brexit also entail a withdrawal from EURATOM, changing UK operators' participation in the nuclear fuel market?

General

- Would the UK government cull a lot of environmental regulation following a Brexit and, if so, make the UK a more attractive place to do business? Would UK institutions seamlessly replace EU implementation and oversight roles and, if so, perform those functions more efficiently?
- Would an overhaul of UK environmental law entail a long period of uncertainty and ultimately lead to inconsistency with the harmonised rules in the EU? As environmental law is a devolved matter within the UK, would Westminster and the devolved administrations create different legal regimes? If so, companies that operate across the UK and the EU may well face a greater compliance burden.

What could the position be following a Brexit?

The answers to many of the above questions would depend on the nature of a post-Brexit UK/EU relationship.

To give an idea of the range of possible outcomes, we have considered what the position would be under the 'Norwegian option' and the 'World Trade Organisation (WTO) option' – on the basis that these are at opposite ends of the spectrum of existing models for an alternative relationship with the EU.

What if the UK left the EU, joined the European Free Trade Association and remained a member of the EEA? (the Norwegian option)

- Under the EEA Agreement, a lot of EU environmental law applies throughout the EEA. So the Norwegian option means the UK would have little power to change its environmental, consumer protection, and health and safety rules.
- The EU regulatory regimes for water, air, chemicals, waste, noise, climate change, energy efficiency, and technical regulations and standards (including REACH) would continue to apply. The EEA countries also participate in the EU Emissions Trading System, and UK domestic legislation binds the country to emissions reductions similar to those imposed by the EU.
- Areas of environmental regulation excluded from the EEA Agreement include the conservation of wild birds and natural habitats. It's questionable whether Westminster or the devolved administrations would want to deregulate in these areas, particularly as the UK would have to withdraw from various international conventions.

What if the UK left the EU without any form of free trade agreement? (the WTO option)

- The UK would no longer be directly bound by EU rules on environmental regulation.

- However, UK exporters would still have to comply with EU product safety and labelling standards in order to place their products on the European single market.
- The UK would also remain bound by the various international conventions to which it is a party (unless it decided to withdraw from those as well). These cover matters such as climate change (the Framework Convention and Kyoto Protocol), access to justice in environmental matters (Aarhus Convention), habitat protection (eg Ramsar) and the protection of endangered species (eg CITES).

Human rights

Current state of play

- Human rights in the UK are currently protected by three main regimes, which work in parallel:•the common law;
- the Human Rights Act (HRA), which incorporates the protections provided by the European Convention on Human Rights (ECHR); and
- the human rights protections derived from EU law, which are mainly reflected in the EU Charter of Fundamental Rights (CFR).
- These regimes give businesses the power to challenge regulatory action on either procedural grounds, eg an inadequate consultation or an unfair trial, or due to substantive violations, eg expropriation of property.

What should I be thinking about now?

- The common law, the HRA and the ECHR will be unaffected by any Brexit. This is due to the domestic basis of the common law, the HRA being a domestic statute and the ECHR being agreed by the 47-nation Council of Europe (not the EU).
- However, unless an agreement is negotiated to the contrary, a Brexit is likely to mean that the EU-based human rights protections, including the CFR, would cease to apply in the UK.
- The HRA and the application of the ECHR in the UK may well be impacted by a (separate) move to a British 'bill of rights'. The scope and timetable of this development are unclear.

What could the position be following a Brexit?

The answers to many of the above questions could depend on the nature of a post-Brexit UK/EU relationship.

To give an idea of the range of possible outcomes, we have considered what the position would be under the 'Norwegian option' and the 'World Trade Organisation (WTO) option' – on the basis that these are at opposite ends of the spectrum of existing models for an alternative relationship with the EU.

Under the Norwegian option, the UK would join the European Free Trade Association and remain a member of the European Economic Area.

Under the WTO option, the UK would rely solely on rights and obligations under WTO rules.

Many of the EU human rights protections are also found in the ECHR or at common law. They will continue to apply under both the Norwegian and WTO options, so the impact of any Brexit on your human rights protection is likely to be limited.

However, given that the CFR won't apply under either option, we believe a Brexit may affect your human rights in two ways, as set out below.

A narrower range of protected rights

The core 'political' rights, such as freedom of speech and freedom from torture, are protected by both the EU and non-EU instruments that currently apply to the UK.

However, the CFR in particular includes many wider social and economic rights, such as the rights to fair and just working conditions, to health care and to have personal data protected. These are not found, or only found to a more limited extent, in other instruments.

Reduced protection of human rights by way of judicial review challenges to primary legislation

If primary legislation is found to be contrary to human rights, it is possible to strike down that legislation if:

- it is within the 'material scope' of EU law; and
- it is found to be contrary to EU law, which includes the protections of the CFR.

This means that in a field currently regulated by the EU, it is in principle open to you to challenge an Act of Parliament if it is incompatible with EU fundamental rights.

Brexit would remove this avenue: under the common law, judges may not strike down legislation; under the HRA, judges are only allowed to issue a 'declaration of incompatibility' in relation to primary legislation.

Your imports and exports

Current state of play

The UK is part of the EU customs union and its single market. The UK's economy depends heavily on international trade in goods. Merchandise trade amounted to 44.7 per cent of its GDP in 2013.

- Because of the customs union, firms in one member state can sell goods to and buy goods from other member states without having to pay customs duties or other charges, irrespective of the country of origin of those goods.
- Businesses in a member state also benefit if their production chain involves other member states, even if they do not export to member states.
- The administration and compliance processes for exporters are much simpler within the EU. For example, UK businesses do not have to declare goods when they ship them to the EU.
- There is a wide range of European legislation aimed at removing non-tariff barriers to trade between member states.
- UK businesses further benefit from the EU's common trade policy and its system of free trade agreements (FTAs). The FTA system includes dozens of states (eg Albania, Bosnia and Herzegovina, Chile, Colombia, Egypt, Faroe Islands, Iceland, Israel, Korea, Mexico, Morocco, Norway, Peru, South Africa, Switzerland, Turkey).
- UK businesses could profit from agreements that are being negotiated or ratified now, for example with the US (TTIP), Canada (CETA) and Japan.
- Trade policy is an exclusive competence of the EU and therefore the UK is not currently able to negotiate its own free trade agreements with third countries.

What should I be thinking about now?

- Will there be any customs duties or other restrictions on exports to and from the EU that will put UK businesses at a competitive disadvantage in the EU and other markets?
- If the UK and the EU were to agree that their post-Brexit relationship should be based on membership of a free trade area rather than a customs union, how would the need to comply with country of origin rules affect my exports from the UK to the EU or vice versa? (In a free trade area participating countries agree to eliminate tariffs on trade between them in goods 'originating' in the free trade area, but retain control over the level of tariff they impose on imports from third countries.)
- As a UK business, could non-tariff barriers restrict my ability to trade with the EU, and is there is risk of such barriers increasing over time if the UK is no longer able to act as an advocate of free trade within the EU?
- Will the UK continue to be protected by European FTAs? Should I relocate my business from the UK to an EU member state to avoid the risk of not (or too late) being able to rely on FTAs?

- As a UK firm, should I set up a subsidiary in an EU member state to produce goods there and reduce the EU customs burden, or to handle customs compliance there?

What could the position be following a Brexit?

The answers to many of the above questions would depend on the nature of a post-Brexit UK/EU relationship.

To give an idea of the range of possible outcomes, we have considered what the position would be under the 'Norwegian option' and the 'World Trade Organisation (WTO) option' – on the basis that these are at opposite ends of the spectrum of existing models for an alternative relationship with the EU.

What if the UK leaves the EU, joins the European Free Trade Association (EFTA) and remains part of the European Economic Area (EEA)? (the Norwegian option)

- EFTA countries that are members of the EEA – currently Norway, Iceland and Liechtenstein – have full, tariff-free access to the internal market. In addition, the EU's 'four freedoms' apply to these three EFTA countries as they do to EU member states. So, if the UK joined EFTA and remained in the EEA, it would still have access to the single market.
- Because non-EU countries do not share the EU's common external tariff, goods entering the bloc would not be guaranteed free travel within it. UK firms would therefore face higher administrative and compliance costs.
- Moreover, if the UK remains part of the EEA post-Brexit, goods could still face anti-dumping action by the EU. In addition, while the UK would have to accept most EU single-market rules, it would have no vote on them and lack direct influence on how services are regulated at EU level.

What if the UK leaves the EU without any form of FTA? (the WTO option)

- The UK's trading relationships would be guided by the rules applicable to WTO members.
- With regard to tariff barriers, the principle of non-discrimination would apply. This requires other states – outside the exceptions for regional trade areas and customs unions – to apply to the UK the same tariff they apply to 'most favoured nations'. However, applying the tariffs might mean many UK exporters become less price competitive in both EU member states and third countries with which the EU currently has FTAs. This is unless the UK negotiates the same or better FTAs with those countries.
- In addition, UK businesses exporting to the EU would still need to comply with EU product standards.

Insolvency and restructuring

Current state of play

- EU member states have made little attempt to harmonise insolvency and restructuring law across the bloc, so the rules remain largely the concern of the individual member states. The main impact of EU law relates to the mutual recognition of insolvency or restructuring proceedings that take place within a particular EU member state.
- The EC Regulation on Insolvency Proceedings (EIR) applies to all member states except Denmark. This means that an insolvency proceeding listed in Annex A to the EIR and commenced in a member state is automatically recognised and – to a certain extent – has exclusivity in any other EU member state, again bar Denmark.
- Companies wanting a scheme of arrangement sanctioned by an English court under the Companies Act 2006 usually argue that the court's sanction order may be recognised under certain other EU legislation (but not the EIR), including the EU Judgments Regulation.
- The EIR does not apply to credit institutions, insurance undertakings, investment undertakings that provide services involving the holding of funds or securities for third parties and collective investment undertakings (collectively 'financial institutions'). However, EU member states, including the UK, have adopted legislation to implement the EU Credit Institutions Winding-up Directive and the Insurance Undertakings Winding-up Directive. These recognise insolvency and reorganisation measures commenced in a financial institution's home EU member state without any further requirements and without the opportunity to open territorially limited proceedings.

What should I be thinking about now?

- What insolvency proceedings in EU member states are available to us? Which process would benefit us most (including from a later recognition perspective)? Will that change if the UK leaves the EU?
- Will an English scheme of arrangement be an option for us and, if so, how beneficial will it be?
- Do we need further legal analysis to ensure that any cross-border insolvency restructuring will have the intended effects across all relevant jurisdictions?
- In a multi-jurisdictional restructuring or insolvency, would we have to take separate restructuring measures with respect to branch offices, subsidiaries or assets in the UK?

What could the position be following a Brexit?

The answers to many of the above questions would depend on the nature of a post-Brexit UK/EU relationship.

To give an idea of the range of possible outcomes, we have considered what the position would be under the 'Norwegian option' and the 'World Trade Organisation (WTO) option' – on the basis that these are at opposite ends of the spectrum of existing models for an alternative relationship with the EU.

What if the UK leaves the EU but joins the European Free Trade Association and remains part of the EEA? (the Norwegian option)

Recognition of insolvency proceedings

- Norway has not implemented the EIR. However, it is party to the Nordic Bankruptcy Convention, which also applies in Denmark, Finland, Iceland and Sweden.
- It seems that the UK will have to decide whether or not the EIR should continue to have effect and, if so, in what form. If it does want the EIR to apply, the UK will have to agree with the EU that its insolvency proceedings will continue to be recognised automatically under the EIR. If such an agreement was reached, UK insolvency proceedings would be the only non-EU insolvency proceedings automatically recognised across the bloc.

Impact on schemes of arrangement

- English courts are willing to sanction schemes of arrangement affecting companies incorporated outside of England where a 'sufficient connection' is established. In doing so, the courts are concerned that their orders will be effective in practice. In particular, courts have looked at whether a scheme would have effect in the scheme company's jurisdiction of incorporation. Effectiveness is usually argued for companies incorporated in EU member states by reference to the EU Judgments Regulation.
- Norway is party to the Lugano Convention, which applies to the EU, Switzerland, Norway and Iceland and is similar to the EU Judgments Regulation.
- It is likely then that the UK would also sign up to the Lugano Convention. As it is so similar to the EU Judgments Regulation, signing up to the Lugano Convention would seem to minimise any real impact to the continued use of English schemes of arrangement.

What if the UK leaves the EU without any form of free trade agreement? (the WTO option)

Recognition of insolvency proceedings

- If the UK does not agree with the EU on the future effect of the EIR:
  - the recognition of UK insolvency proceedings in the EU will likely require applications to the domestic courts for judicial assistance under the Cross-Border Insolvency Regulations 2006 ('the Regulations') as well as the much-debated common-law concept of comity of insolvency proceedings; and
  - inbound insolvency proceedings (ie those seeking recognition in the UK) will become reliant on the Regulations and common law comity.
- These issues also arise in relation to entities covered by the EU's Credit Institutions Winding-up Directive and Insurance Undertakings Winding-up Directive.
- The critical impact would be that recognition and assistance in insolvency proceedings would require court applications in the UK and EU, which can be determined based on judicial discretion.

Impact on schemes of arrangement

In the absence of any agreement with the EU on the mutual recognition of court judgments, it is expected that English courts would continue to respect provisions in commercial contracts (including finance documents) that confer jurisdiction by agreement on the English courts.

The question of how such clauses and judgments made by English courts assuming jurisdiction from such clauses will be treated by courts in EU member states will be a matter for the laws of those member states.

Finally, with no mutual recognition agreement, the enforcement of English court judgments in the EU is likely to be significantly more complex than it currently is. This in turn would make the grounds on which English courts sanction schemes of arrangement uncertain.

Your intellectual property

Current state of play

- EU member states benefit from a range of pan-EU intellectual property regimes. These include pan-EU IP rights, like EU Trade Marks and Registered Community Designs, and central administration schemes, like the European Patent Office (which also extends beyond the EU). These systems create economies of scale for owners of multinational IP portfolios.
- A new EU unitary patent system is due to be introduced in the next few years.
- Many domestic UK IP rights stem from EU law. UK courts must interpret those rights in line with decisions of the EU Court of Justice.
- National courts in the EU can, in some cases, issue pan-EU injunctions against IP infringers.

What should I be thinking about now?

- Portfolio management – Do I need to make any changes to my filing and management strategy to ensure my unitary EU IP rights (including any new unitary patents) would be protected in both the EU and UK post-Brexit?
- Enforcement – Would I still be able to rely on any existing injunctions to protect my rights - in the UK or in the rest of the EU - post-Brexit? Which courts should I be applying to in any litigation I am currently planning in order to get the most effective remedies?
- Licensing – Are my existing licensing arrangements ready for a Brexit? If the UK leaves unitary schemes, will my existing licences cover transitional or successor national rights in the UK? Should I be thinking about including special provisions in any new licences to cover transitional or successor national rights?
- IP diligence – If I am buying or selling a business, what would be the potential impact of a Brexit on the target's IP licences and on security over the target's IP rights?

What could the position be following a Brexit?

The answers to many of the above questions would depend on the nature of a post-Brexit UK/EU relationship.

To give an idea of the range of possible outcomes, we have considered what the position would be under the 'Norwegian option' and the 'World Trade Organisation (WTO) option' – on the basis that these are at opposite ends of the spectrum of existing models for an alternative relationship with the EU.

What if the UK left the EU, joined the European Free Trade Association and remained a member of the European Economic Area (EEA)? (the Norwegian option)

- The UK would continue to participate in the European Patent Office.
- Unitary EU IP rights, eg EU Trade Marks and Community Designs, would not continue in the UK. Parliament might introduce new 'successor' IP rights. However, this could cause issues with existing IP licences, security over IP rights, and judgments and injunctions in IP proceedings.

- National rights based on or influenced by EU directives, eg copyright, supplementary protection certificates, national trade marks and national designs, would continue. It is likely that they would remain aligned with EU law as most relevant directives apply to the EEA.
- Exhaustion rules prevent trade mark and design right owners from using their IP rights to restrict the sale of goods that have been put on the market in the EEA with their consent. These rules apply EEA-wide, and so would be unchanged from the present position.
- The new unitary patent system would be vulnerable to a Brexit. Not only is the new system limited to EU member states, but the UK must also ratify the agreement for the new system to come into effect. A Brexit would require the existing agreement to be re-written, and the new unitary patent rights to be extended to the UK as a non-EU jurisdiction.

What if the UK left the EU without any form of free trade agreement? (the WTO option)

- The UK would continue to participate in the European Patent Office.
- Unitary EU IP rights, eg EU Trade Marks and Community Designs, would not continue in the UK. Parliament might introduce new 'successor' IP rights. However, this could cause issues with existing IP licences, security over IP rights, and judgments and injunctions in IP proceedings.
- National rights based on or influenced by EU directives, eg copyright, supplementary protection certificates, national trade marks and national designs, would continue. The UK would be unlikely to diverge quickly from existing EU law without repealing existing domestic legislation.
- Current exhaustion rules would mean that trade marks and design rights could be used to restrict imports from the UK into the EU. New rules would need to be agreed with the EU to maintain the present position and avoid price differentials arising between the UK and the EU.
- The new unitary patent system would be vulnerable to a Brexit. Not only is the new system limited to EU member states, but the UK must also ratify the agreement for the new system to come into effect. A Brexit would require the existing agreement to be re-written, and the new unitary patent rights to be extended to the UK as a non-EU jurisdiction.
- UK courts would no longer be required to interpret UK IP law in light of EU rules. This could result in a gradual divergence of UK and EU IP law.

Your people

Current state of play

1. Workforce regulations – UK legislation governing how employers must treat their workforce is heavily influenced by EU requirements. One example is the maximum working week. Another is the restricted right of employers to vary the contract terms of employees they acquire when taking over another business.
2. Employing workers across borders – It is a fundamental principle of EU law that workers can move between member states without restriction. This means that UK citizens can work in other member states without needing a visa or residence permit, and vice versa. It also means that, in principle, such "cross-border workers" are entitled to receive the same social benefits as the citizens of their host member state, such as state pension benefits and access to the national healthcare system.
3. Providing services across borders – EU law makes it easier for service providers based in the UK (like accountants or travel agents) to do business in other member states. In many sectors, national regulators cooperate to ensure that if a service provider passes checks in its home member state, it does not have to go through those same checks in its host member state. In the financial services sector, this is achieved through the so-called "passport" system.
4. Remuneration in the financial sector – EU remuneration rules in the financial services sector impose a cap on bonuses and require the remuneration of senior employees to be publicly disclosed.
5. Pensions – EU prohibitions on age and sex discrimination are highly relevant to pension schemes. EU law also provides a framework allowing pension schemes that are approved to operate in one member state to admit members in other member states.

What should I be thinking about now?

- Employing workers across borders – How would a UK exit from the EU affect my ability to hire staff? Would existing staff need visas and/or residence permits if I wanted to second them from the UK to work for the firm in another European country or vice versa? Would I find it more difficult or costly to employ UK citizens in other European countries, or European citizens in the UK, if their rights to access benefits in their host country were restricted?
- Workforce regulations – Would I want to change my approach to workers' hours if UK law became more flexible in this area? Would the UK legal framework on workers' rights on a business transfer be likely to change if Britain left the EU? If so, how would that affect my approach to buying businesses?
- Providing services across borders – Do I currently rely on regulatory approval from my home regulator to operate in other EU member states? If so, how might I manage interacting with additional regulators if I could no longer rely on home regulator approval? Would it help to establish a local subsidiary?
- Remuneration in the financial sector – What would be the effect for a financial institution currently subject to the bonus cap, or other EU remuneration requirements, if the UK left the EU and disapplied these

for UK-based firms? How would an EU-based firm attract and retain talent in its UK business?

- Pensions – How would I manage my firm's cross-border pension scheme if it became subject to different regulatory requirements in different European countries?

What could the position be following a Brexit?

The answers to many of these questions will depend upon the nature of a post-Brexit UK/EU relationship.

To give an idea of the range of possible outcomes, we have considered what the position would be under the 'Norwegian option' and the 'World Trade Organisation (WTO) option' – on the basis that these are at opposite ends of the spectrum of existing models for an alternative relationship with the EU.

What if the UK leaves the EU but joins the European Free Trade Association and remains part of the EEA? (the Norwegian option)

The Norwegian option would probably involve less change to employment and pensions law compared to other options, especially in the short term.

Countries that are members of the EEA but not the EU – currently Iceland, Norway and Liechtenstein – have had to implement much of the EU legislation outlined above, including limits on the maximum working week, protections for employees on the transfer of a business, and the bonus cap for employees in the financial sector.

For the UK to disapply EU-derived legislation in these areas, it would likely need to negotiate exceptions to the EEA Agreement with other EEA countries, in particular the EU member states. While we would expect the current UK government to want to do this, the process would not be completed quickly.

Finally, the fundamental principle of free movement of workers applies throughout the EEA. So under the Norwegian option, nothing would change for the UK in this respect.

What if the UK leaves the EU without any form of free trade agreement? (the WTO option)

Compared with the Norwegian option, the WTO option could result in fairly extensive changes to UK employment and (to a lesser extent) pensions law.

For example, the UK would have greater scope to change such laws as it would not have to comply with EU law under the EEA Agreement.

However, we would not expect the UK government to allow all EU-derived employment laws to fall away after a Brexit. Instead, we anticipate a transitional period, during which the current framework is largely kept in place. The government would review all employment legislation and gradually repeal or amend individual laws as it sees fit. Possible candidates include limits on the maximum working week and the bonus cap.

As far as the fundamental principle of free movement of workers is concerned, it would cease to apply under the WTO option. As a result, the UK and EU member states would be able to impose visa and/or work permit controls on the cross-border movement of workers.

Your real estate

Current state of play

- Real estate law is one of the few legal branches which have remained essentially national and in which differences amongst national laws remain the greatest. As such, the implications of a possible Brexit on market conditions and inward investment are greater concerns to the industry than the pure legal ones.
- There are however areas which are particularly relevant to real estate investors and transactions by virtue of the UK's membership of the EU, including the regulatory environment surrounding investment funds (such as the Alternative Investment Fund Managers Directive (AIFMD)), planning requirements such as environmental impact assessments and EU directives relating to improving energy efficiency.
- At present, Britain is Europe's choice for commercial property investment. It remains the preferred market and London the top European city.

What should I be thinking about now?

- There is a divergence of opinion in the market as to the potential commercial effects of a Brexit on the property industry. Would it fundamentally change the UK's status as Europe's primary choice for commercial property investment, causing the flow of foreign capital to reduce? Or is the UK such an attractive global market that ceasing its EU membership would have limited impact for overseas investors?
- There is a question whether a Brexit would change the fundamental basis on which investors can access (and exit) the UK property market. If trading across borders becomes more difficult, will this have a negative impact?
- London's influence and power is linked to its status as Europe's largest financial centre; would this change following a Brexit? Would banks and financial institutions look to relocate to other EU financial centres to guarantee business continuity?
- Would the rest of the occupier market suffer? Would global organisations and companies consider reducing their UK operations? Would a Brexit (or the possibility of one) result in occupier nervousness, with a resulting reduction in take-up?
- Changes to freedom of movement provisions could have an impact on the industry, for example restrictions on workers' migration could potentially affect the cost of construction projects, and the ease of movement of goods and services could affect property owners, tenants and developers.
- Would there be substantial changes to relevant legislation that I need to be aware of? This is unlikely, the majority of the UK legislation affecting the property industry which emanates from the EU (including construction and planning and environmental issues) is likely to be retained.

What could the position be following a Brexit?

As real estate law has remained largely a national concern and therefore unaffected by EU membership, a Brexit would not have a significant effect on UK property law.

However, a Brexit could affect market conditions and foreign investment in UK real estate; the precise impact will depend on the nature of the post-Brexit UK/EU relationship.

The performance of the UK economy, and any changes in perception about Britain's importance in the world, are likely to be more significant in this context than any purely legal changes.

However, as mentioned above, EU laws on the likes of the free movement of workers, the environment and even the AIFMD are relevant to the UK real estate market.

Under the 'Norwegian option' for a post-Brexit UK/EU relationship, these laws would continue to apply, so there would be a lot of continuity with the current position.

Under the 'World Trade Organisation option', the UK would in principle be free to make its own laws in these areas. But the effect would obviously depend on the nature of the changes made.

Your sales and tender processes

Current state of play

- EU firms are guaranteed access to the EU's public procurement market without discrimination under the EU Treaty and procurement directives.
- The general EU procurement directive dealing with contracts awarded by state entities neither specifically allows member states to exclude bidders from third countries from public procurements in EU member states nor prevents authorities from imposing such measures themselves.
- But, under certain circumstances, specific EU procurement directives explicitly allow the market to be closed to foreign bidders from third countries, namely in the utilities (telecoms, post, water, energy) and defence sectors.
- What will happen in future is unclear. The Commission put forward a Procurement Initiative in 2012 that aims to restrict access to the EU public procurement market for third countries that are reluctant to offer reciprocal access to their markets. But a new directive is unlikely to restrict access to the EU procurement market for countries (including the UK) that are parties to the Agreement on Government Procurement.
- EU companies can access procurement markets in countries across the world through numerous international treaties.

What should I be thinking about now?

- Is there an existing treaty between the EU and a third country that allows me full access to procurement procedures? If so, would I have equivalent rights after a Brexit?
- As a UK business that tenders for significant contracts in the utilities (or defence) sector in Europe, would I still have access to the EU's public procurement market without discrimination following a Brexit? Or would I stand to lose important opportunities for EU business?

What could the position be following a Brexit?

The answers to many of the above questions would depend on the nature of a post-Brexit UK/EU relationship.

To give an idea of the range of possible outcomes, we have considered what the position would be under the 'Norwegian option' and the 'World Trade Organisation (WTO) option' – on the basis that these are at opposite ends of the spectrum of existing models for an alternative relationship with the EU.

What if the UK leaves the EU, joins the European Free Trade Association and remained a member of the European Economic Area (EEA)? (the Norwegian option)

There would be no impact on current applicable public procurement law. Under the EEA Agreement, non-EU states that join the EEA still participate in the EU's internal market by adopting all the relevant EU legislation, apart from that on fisheries and agriculture. This means that the EU's public procurement law will continue to apply.

What if the UK leaves the EU without any form of free trade agreement? (the WTO option)

- The General Agreement on Tariffs and Trade (GATT) does not cover public procurement. Moreover, neither the GATT principle of national treatment nor the 'most favoured nation' clause apply to laws, regulations or requirements governing the procurement by governmental agencies of products purchased for governmental purposes, ie products not purchased for either commercial resale or for use in the production of goods for commercial sale.
- In this context, several WTO members, including the EU, are parties to the plurilateral government procurement agreement (GPA), which guarantees access to the procurement markets of the contracting states.
- However, the UK is not party to the GPA so with a Brexit the UK would no longer be bound by or entitled to rely on it. Consequently, UK businesses may not have the right to access procurement markets of GPA signatories unless the UK becomes a contracting party itself. However, some GPA signatories, such as the EU, allow companies to participate in procurement procedures even if they are not based in a GPA contracting state.

Tax implications of the UK leaving the EU

Overview

- The current balance of competences between the EU and the UK on tax is quite intricate, with a tension between member states' desire to determine their own tax systems and the EU-led aim of a level playing field.
- The EU most obviously influences member states' indirect taxation (particularly VAT and excise duties), but there are some business-friendly EU Directives relevant to direct taxation as well as the state aid regime, and member states must exercise their tax powers consistently with EU law.
- A Brexit may have no immediate effect on legislation incorporated into UK law and post-Brexit, the UK could amend tax law without EU constraints – however, it may not want to depart from generally business-friendly (or, in the case of VAT, revenue raising) EU Directives.
- The scope of change would depend on the model of any new, post-Brexit relationship between the UK and the EU.
- A Brexit would not remove other international influences on the UK tax system, eg the OECD's Base Erosion and Profit Shifting (BEPS) project and information exchange regime.
- Post-Brexit, the UK would still benefit from and would be bound by its extensive network of double tax treaties.

EU and UK balance of competences on tax

The current balance of competences between the EU and the UK in relation to tax is quite intricate. Some EU laws are automatically part of UK law without the UK needing to make separate laws. Others require UK legislation, which the UK is obliged to implement. UK law must accord with EU law and any tax rules which do not can be disapplied and taxes wrongly paid required to be reimbursed. In addition, the UK courts may need to consider how the EU courts would interpret legislation in coming to their decisions and must in some cases refer points of EU law to the EU courts.

Generally speaking, the EU-led tax rules which are incorporated into law in the member states are aimed at creating a level playing field for companies operating within the internal market of the EU and at the removal of tax obstacles to cross-border activity. However, the member states still have control of their own tax systems and the ability to adapt these systems to their specific national circumstances (and the UK government has been particularly keen to retain as much control as possible). So there can be a tension when this domestic flexibility is required to be given up to EU-led policies.

EU impact on the UK taxation system

Indirect taxes

Probably the most obvious EU influence on UK tax policy is in relation to indirect taxation, and in particular VAT and excise duties.

VAT was introduced to member states as a uniform tax system with the aim of promoting competition and trade, and the VAT Directives provide for a harmonised VAT framework across the member states with set minimum rates. The UK implemented the VAT Directives when it joined the EEC in 1973, having negotiated some significant derogations, notably the UK's zero rates which are applicable to the supply of certain goods and services.

Although not harmonised to the same extent as VAT, excise duties are the other main indirect taxes governed by EU rules. Tobacco, alcohol and energy are all subject to excise duties and member states are also bound by agreed minimum rates for each of these. As with VAT, member states are free to set excise duties above the minimum rates at the level they consider appropriate in light of their national circumstances.

The EU Capital Duty Directive is also worth a mention. This essentially prohibits member states from taxing the raising of capital. Its application has been tested recently in relation to the UK law provisions which impose a 1.5% ad valorem tax charge on the issue of shares and securities to clearance services or depositories in certain circumstances. The EU courts found that the UK rules were contrary to the Capital Duty Directive and HMRC have been forced to accept that they cannot seek to impose the charge and have repaid tax wrongly paid.

Direct taxes

Direct taxes tend to be a matter for the member states themselves. There is, however, some relevant EU legislation, which is primarily aimed at removing obstacles for businesses operating within the EU. This includes the Merger Directive, the Parent-Subsidiary Directive, the Interest and Royalties Directive and the state aid regime (provided for in the Treaty on the Functioning of the EU).

The Merger Directive applies to mergers, divisions, transfers of assets and exchanges of shares which take place between companies in different member states. The Parent-Subsidiary Directive is concerned with profit distributions between associated companies in different member states and the Interest and Royalties Directive prevents withholding taxes on royalty and interest payments. The state aid regime prohibits member states from granting state aid, which can include beneficial tax regimes, that distorts competition and trade in the EU. This has come into the spotlight recently with formal state aid investigations opened by the European Commission to review the tax ruling practices of all EU member states.

In addition to the specific Directives and the state aid regime, member states are more generally required to exercise their power to tax consistently with EU law and in particular with the fundamental freedoms. The UK can be required to amend its tax legislation where it is found not to be consistent with EU law. A good example of this is the Marks and Spencer case, as a result of which the UK was obliged to amend its group loss relief legislation to permit relief for non-UK losses in certain circumstances. Decisions of the EU courts have also had an impact on the UK's controlled foreign company rules and many other aspects of the UK's direct tax system are nowadays shaped to some extent by the need to adhere to the fundamental freedoms.

Tax evasion and information reporting

The EU has also sought to tackle issues of cross-border tax evasion through EU legislation. This was initially achieved by the EU Savings Directive (EUSD) which required member states to provide details of

certain payments to the tax authorities of other member states. However, there have been significant developments in this regard with the amendment of Directive 2011/16/EU on administrative cooperation in the field of taxation to provide for the automatic exchange of financial account information between tax authorities of member states using the OECD's common reporting standard (CRS). The CRS has effect in the UK from 1 January 2016. As a result of these developments the European Commission has repealed the EUSD to prevent overlap with the new CRS regime.

Advantages of the current UK–EU relationship

Largely harmonised regulations, such as in relation to VAT, give businesses a clear framework within which to operate. The UK also currently benefits from free trade within the EU:–goods are able to move freely with no border controls and no import VAT (which is a cashflow cost for businesses) and no duties (a real cost for businesses).

Businesses in the UK also benefit from measures which reduce the cost of doing business for groups operating in more than one member state. As mentioned above, various Directives reduce the costs of reorganisations, distributions and payments of interest and royalties. The UK can also challenge other member states that introduce state aid measures that are disadvantageous to UK businesses.

Currently, member states have the ability to veto EU tax measures which they don't agree with. This approach gives member states a degree of protection for national interests, together with the benefit of a uniform taxation system as far as it can be agreed.

Disadvantages of the current UK–EU relationship

The UK legal system is subordinate to the EU legal system in areas of EU competence and the UK must, with some caveats, adopt EU legislation and ensure that its legislation is consistent with EU law and the fundamental principles. The UK does not, therefore, have complete freedom in relation to its tax system. There have been a number of instances where the UK has been required to amend its tax legislation as a result of judgments of the EU courts (including judgments which have been criticised for their lack of foundation on precedent or poor quality of reasoning).

There is also a sense that the EU's influence is extending further. For example, the UK has come under pressure in relation to its VAT derogations, with the EU pushing for greater harmonisation. In addition, measures being considered include a proposal for a common consolidated corporate tax base (an initiative aimed at establishing a single set of rules that companies operating in the EU would use to calculate their taxable profits) and the EU financial transactions tax (to be levied on transactions in financial instruments where one party is in a participating member state). The UK government has objected to both of these proposals, clearly feeling that they go too far in constraining the UK's ability to shape its own tax policy and its objective of creating the most competitive corporate tax regime in the G20.

Impact of leaving the EU

The impact of leaving the EU would clearly depend on the relationship between the UK and the EU following a Brexit. As a general point, though, a Brexit would have no immediate effect on any legislation which has been incorporated into UK law, although, of course, the UK government would have the freedom to amend the law if it wished and without the boundaries set by EU Directives and the fundamental freedoms.

Assuming the ongoing relationship between the UK and the EU didn't include similar provisions, the UK would no longer be required to give effect to the VAT Directives, the Merger Directive, the Parent-Subsidiary Directive, the Interest and Royalties Directive, the Capital Duties Directive or the state aid regime. The loss of the benefit of the Parent-Subsidiary Directive and the Interest and Royalties Directive will to some extent be set off by the UK's extensive network of double tax treaties which will continue in force following a Brexit. Such tax treaties will continue to act to eliminate withholding taxes on dividend, interest and royalty payments in a number of cross-border EU situations, but not all (including, for example, Germany and Luxembourg). Groups may therefore need to assess whether the tax treaty network is sufficient to deal with withholding tax issues on such payments. Further, the UK could enforce the 1.5% tax charge on issue of shares and securities to clearance systems and depositories and could impose laws contrary to each of these Directives (although there is, of course, a question over whether it would want to do so: VAT makes up a large proportion of the UK's tax revenue and the other Directives are generally seen as business-friendly).

There is also a question about to the extent to which existing and future EU jurisprudence, including decisions of the EU courts, could or should be relied on to assist in interpreting UK law post Brexit. Such jurisprudence may remain binding when addressing questions relating to periods before a UK exit, but not to any questions relating to periods after that.

Other influences on the UK tax system

It is worth noting that a Brexit would not remove international influence on the UK tax system. The OECD is becoming increasingly influential in driving international tax policy (and is perhaps more influential than the EU in some respects). The OECD's Base Erosion and Profit Shifting (BEPS) project, which aims to create an improved system of taxation for international businesses, has reached the end of phase one with final reports on the 15 action points issued in October 2015. Phase two will focus on implementation of the recommendations and it appears inescapable that the BEPS project will have a significant impact on the UK corporate tax regime. Indeed, the UK has already published draft legislation, as part of Finance Bill 2016, introducing new rules to address hybrid and other mismatches which reflect the recommendations under Action 2 of the BEPS project.

The EU is working closely with the OECD in respect of the BEPS project. It is expected there will be a push to align new and existing EU legislation with the OECD recommendations set out in the final BEPS reports. Consequently, if the UK remains within the EU it may have significantly less control over the implementation of the BEPS project, as has already been demonstrated by requiring member states automatically to exchange information on their corporate tax rulings which will take effect from 1 January 2017 and which is in line with the recommendations under Action 5 of the BEPS project.

Following a Brexit, the UK would also continue to benefit from and would be bound by its double tax treaties including anti-discrimination provisions.

Other models for a future UK-EU relationship

There are various ways the relationship between the UK and the EU member states might operate following a Brexit.

A detailed discussion of these is beyond the scope of this note. To give an idea of the range of possible outcomes we have considered what the

position would be under the 'Norwegian model' (ie UK membership of the EEA) and the 'WTO model' (ie reliance solely on rights and obligations under WTO rules) – on the basis that these are at opposite ends of the spectrum of existing models for an alternative relationship with the EU:

Norwegian model

If the Norwegian model were followed, with the UK becoming a member of EFTA (the European Free Trade Association) and the EEA (the European Economic Area), the UK would have full access, in principle, to the EU single market. It would also be required to comply with the EU single market rules (including the fundamental freedoms) but would have limited ability to influence these. Further, as the EFTA Court performs largely the same functions as the Court of Justice of the European Union, the role of the UK courts in interpreting and applying EU law would remain broadly the same.

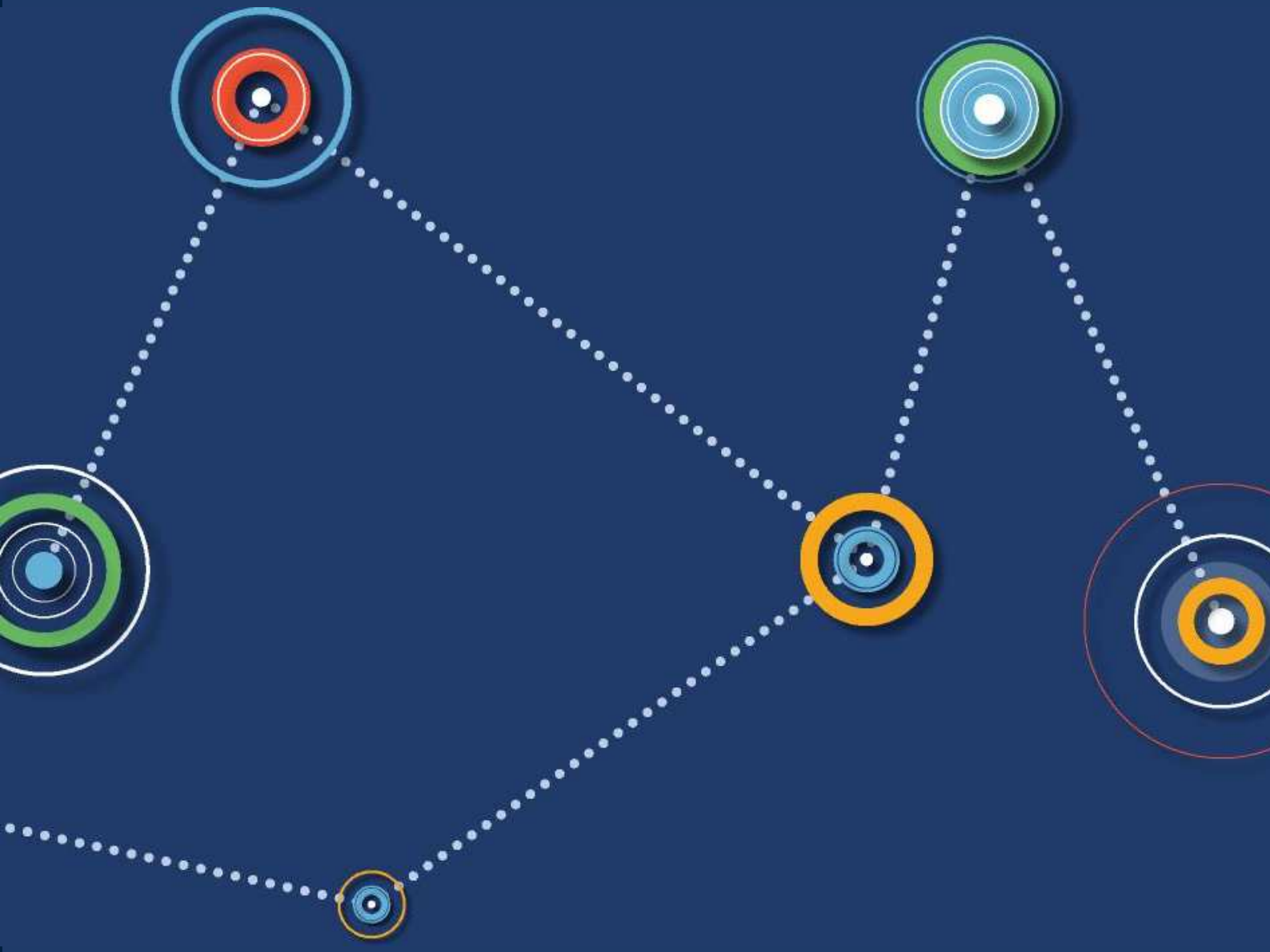
One major difference for tax purposes would be that the UK would be outside the EU customs union. However, the UK would benefit from any EFTA customs agreements, which would likely mean that any exports to the EU originating in the UK would still be tariff-free, but tariffs would be imposed on imports from other countries (country of origin conditions).

WTO model

Another option would be a WTO model. Such an approach would mean the UK would be in a similar position to the US, namely trade with the EU would be based only on the UK's membership of the WTO. UK goods exported to the EU would be subject to the EU's common external tariff. The UK would not be part of the internal market nor subject to single market legislation nor the political process.

Freshfields Bruckhaus Deringer

Impact on your industry



Effects on European and UK energy regulation

Current state of play

- Authorised UK firms can easily participate in the EU's internal energy market.
- Much UK legislation comes from European directives or regulations. It is often complemented by network codices, which the transmission system operators compile as 'regulated self-regulation' in institutions such as the European Network of Transmission System Operators for Electricity (ENTSO-E) or the European Network of Transmission System Operators for Gas (ENTSO-G).
- Companies can run transmission systems, or can take a share in a transmission system operator, anywhere in the EU. To do so they only need meet the national legislative conditions, which are based on the requirements of the directive on common rules for the internal electricity market and the corresponding directive on natural gas.
- Under the regulation on guidelines for trans-European energy infrastructure, projects of common interest that are implemented into the EU list are eligible for EU financial support. An accelerated permit-granting process applies to these projects.
- Some member states are planning to install non-discriminatory capacity markets that should be accessible to all EU energy suppliers that meet the pre-qualification terms. The EU Commission has already authorised the UK capacity market.
- UK firms with high carbon dioxide emissions, such as electricity producers and manufacturers, participate in the EU Emissions Trading System. They can buy or sell EU emission allowances, which allow them to emit certain quantities of carbon dioxide. The EU Emissions Trading System is a key instrument in meeting the reduction targets set out in the Kyoto Protocol, which the EU and its member states have ratified.

What should I be thinking about now?

- ENTSO membership
  - As a UK transmission system operator, will I still be a member of the ENTSO-E or ENTSO-G if Brexit happens?
  - How would EU-derived UK legislation be affected by a Brexit? Would the transmission network codices still apply?
- Projects of common interest and financial support ◦Will projects of common interest be removed from the EU list if they are linked to the UK?
  - As an investor, under what conditions will I have access to EU financial support if my investment in energy infrastructure is linked to the UK?
  - Will I have to refund any financial support given before a Brexit?
- Access to and operating transmission networks ◦As a UK energy supplier, will I have access to European transmission networks?
  - As an EU energy supplier, will I be able to access UK grids?

  - Would a Brexit affect any ongoing energy supply contracts?
  - As a transmission system operator that runs a transmission system in the EU, would I have to apply for a new certificate if my shareholder is a UK company?
- Capacity markets ◦As an EU energy supplier, will I be able to take part in the auction process for the UK capacity market?
  - Will UK energy suppliers be able to take part in future capacity mechanisms in the EU?
- EU Emissions Trading System ◦What impact would a Brexit have on trading and transferring EU emission allowances between UK and EU companies?
  - Will emission allowances held by UK firms still be valid if the UK leaves the EU?

What could the position be following a Brexit?

The answers to many of the above questions would depend on the nature of a post-Brexit UK/EU relationship.

To give an idea of the range of possible outcomes, we have considered what the position would be under the 'Norwegian option' and the 'World Trade Organisation (WTO) option' – on the basis that these are at opposite ends of the spectrum of existing models for an alternative relationship with the EU.

The Norwegian option

- Under this option, the UK would join the European Free Trade Association and remain part of the European Economic Area (EEA).
- Not all EU law that affects the energy sector applies to the EEA. The 2003 'second common market package' of EU internal energy market legislation was adopted by the EEA in 2005. However, there is some subsequent legislation that is not extended to the EEA. For example, there is still no decision on whether the EEA will adopt the 2009 legislation establishing the single market in electricity. Furthermore, it is doubtful whether the financial support for projects of common interest under the EU Regulation on guidelines for trans-European energy infrastructure (known as the 'TEN-E Regulation') will be extended to the EEA.
- UK membership of the EU is not necessary for a UK transmission system operator to be a member of ENTSO-E or ENTSO-G. UK transmission system operators could therefore remain members of ENTSO-E and ENTSO-G and continue to influence the development of network codices.

The WTO option

- Under this option, the UK would leave the EU without any free trade agreement in place. It would instead rely solely on rights and obligations under WTO rules.
- UK energy policy following a Brexit would be determined at national level and UK legislation could diverge from that of the EU.
- UK transmission system operators could remain members of ENTSO-E and ENTSO-G in the same way as under the Norwegian option.

Financial services

Current state of play

- The UK is seen as the key financial centre of the European Union and as an attractive location for financial services businesses. Many banks and other financial services companies are headquartered in the UK, and many others see the UK as a place they need to be and a convenient location from which to access the wider European market.
- EU directives allow financial services firms authorised in one member state to carry on business in any other member state without the need for a separate host state authorisation (the so-called passport system), either by establishing a local branch or on a cross-border basis.
- The passport system is supported by an extensive body of EU directives, regulations and subordinate legislation and guidance. EU supervisory authorities have significant powers. A lot of new legislation has been, and is continuing to be, introduced as a result of the financial crisis to address conduct issues and risks to financial stability. Much of the UK regulatory regime is derived from Europe.
- Whereas in the past the focus of European financial services regulation has been on establishing minimum standards, in recent years there has been a trend towards maximum harmonisation and a 'single European rulebook', which is overseen by the system of European supervisory authorities: ESMA; the EBA and EIOPA.
- EU legislation establishes the respective responsibilities of home and host state regulators for business with a cross-border element and provides a framework for regulators to cooperate with each other, both in relation to routine supervisory activities and in special cases such as changes of control, recovery and resolution planning and investigations.
- In some areas EU legislation provides a framework within which non-EU firms may access the EU single market. This is generally restricted to wholesale business and depends on the non-EU regulatory regime being assessed as equivalent to the EU regime. It is also generally dependent on cooperation agreements being in place between the relevant authorities in the non-EU country and the EU.
- One interesting development is the likely delay to the overhaul of the EU markets in financial instruments rules (MiFID II). Presently, MiFID II is due to come into effect on 3 January 2017. However, the application of the rules is widely expected to be delayed by at least a year. Such a delay would mean that the legislation could become binding after a vote to leave but before a Brexit. As a result, affected firms would still have to implement the extensive new rules even while the UK was negotiating its future relationship with the EU.

What should I be thinking about now?

- Access to EU and UK markets
  - If my business currently relies on the passport system to provide financial services from the UK to the rest of Europe or vice versa, would I still have these rights on a Brexit?◦
  - If not, what would be the status of existing branches of UK firms in the EU, and of EU firms in the UK? To what extent might an EU equivalence regime give me the market access I need?

  - As a business headquartered outside the EU and currently accessing the EU market through a UK subsidiary, or as a UK headquartered firm, how would my structure and strategy be affected by a Brexit? Should I consider establishing a subsidiary in a country that will continue to remain in the EU?
  - At what stage should I think seriously about precautionary steps to ensure business continuity in the face of the risks posed by a possible Brexit?
  - With the likely delay to MiFID II until 2018, should I take account of a possible Brexit in my MiFID II planning?
- Market infrastructure: as a trading venue or clearing or settlement system based in the UK, to what extent might regulatory restrictions or action by EU authorities curtail the ability of EU-based firms to use my services after a Brexit? Would a Brexit limit my rights to link up with EU-based market infrastructures? Would the ECB's location policy be relevant again?
- Remuneration: I am a UK firm currently subject to the bonus cap and remuneration rules: will these rules be relaxed or disapplied following a Brexit? I am an EU firm with a UK business: will I continue to be subject to the EU remuneration rules? Will this make it harder for me to attract and retain talent compared to UK firms?
- Establishing and marketing funds: as a fund manager currently taking advantage of rights to market my funds in the EU, would I need to re-domicile my funds or my fund management activity to enjoy the same market access in the future?

What could the position be following a Brexit?

The answers to many of the above questions would depend on the nature of a post-Brexit UK/EU relationship.

To give an idea of the range of possible outcomes, we have considered what the position would be under the 'Norwegian option' and the 'World Trade Organisation (WTO) option' – on the basis that these are at opposite ends of the spectrum of existing models for an alternative relationship with the EU.

What if the UK leaves the EU but joins the European Free Trade Association (EFTA) and remains part of the EEA? (the Norwegian option)

- EEA and EFTA membership would allow the UK to retain access to the single market in financial services. However, it would still have to comply with EU single-market rules made by the EU institutions.
- A number of post-crisis single-market measures across the EEA have been delayed by problems arising from the scope of the powers that pan-EU regulatory authorities would have in the EEA states. Those problems are now being resolved, and accordingly there should be no change to either UK firms' ability to do business elsewhere in the EEA or the ability of firms based elsewhere in the EEA to do business in the UK.
- However, the UK would have significantly less power to influence single-market rules. If those rules changed, the UK would have to accept them.

What if the UK left the EU without any form of free trade agreement? (the WTO option)

- The UK would no longer be part of the single market and would lose all its influence over EU legislation.
- The 'passporting' of licences would cease to apply.

- Under a number of single-market directives and regulations, UK firms would not be able to maintain access to the relevant EU markets unless UK legislation remained equivalent to EU rules. No access is allowed in some areas. For example, under EU law, the management company of an undertaking for collective investment in transferable securities (UCITS) must be an EEA firm.

Media businesses

Current state of play

Regulatory framework for the media sector

In the EU, broadcasting is primarily regulated under the Audio-visual Media Services (AVMS) Directive.

•The AVMS Directive distinguishes between 'linear' services (eg scheduled broadcasting via traditional television) and 'non-linear' services (eg internet-based 'over-the-top' (OTT) services such as video-on-demand (VoD)).

•As linear services 'push' their content to viewers – who have no influence on the content – they are subject to more stringent regulation. For example, providers of linear broadcasts have to reserve the majority of their production, budget and transmission time for European works and must ensure that at least 10 per cent of their programming is supplied by independent producers. Non-linear services are not subject to such fixed quotas.

•Television advertising and teleshopping are regulated by the AVMS Directive as well, including limitations with regard to presentation and frequency of advertising and teleshopping.

EU licences for digital content

National organisations which collect royalties for the copyright owners (ie the artists) in the EU have paved the way for pan-EU licences which can be bought by services marketing online music, such as Spotify, Google Music or iTunes. Similarly, the Commission is giving consideration to promoting further initiatives to foster EU-wide cross-border licensing of online content.

What should I be thinking about now?

Broadcasting

The UK regulator, Ofcom, has indicated that it would like to take a more stringent approach to regulation of OTT services than is required under the AMVS and align the regulation of VoD and traditional television. It is possible that, following a Brexit, Ofcom would put these policies into practice and enforce a stricter regulation of OTT services. In such a case, OTT providers in the UK might seek to relocate their business to the EU and curtail their UK investments in the hope of mitigating regulatory risk.

Pan-EU licences

An important question is how pan-EU licences (for all kinds of content) would be affected by a Brexit - would these still cover UK content? This also affects future licenses - separate agreements might be required in order to license content originating the UK.

What could the position be following a Brexit?

The answers to many of the above questions would depend on the nature of a post-Brexit UK/EU relationship

To give an idea of the range of possible outcomes we have considered what the position would be under the 'Norwegian option' and the 'WTO option' – on the basis that these are at opposite ends of the spectrum of existing models for an alternative relationship with the EU.

What if the UK leaves the EU but joins the European Free Trade Association and remains part of the European Economic Area (EEA)? (the Norwegian option)

The four freedoms as laid down in the Treaty on the Functioning of the European Union (ie the free movement of goods, services, persons and capital, as well as competition and state aid rules) are incorporated in the EEA Agreement. This mean that the AVMS Directive is applicable throughout the EEA. Hence, nothing would change since the UK would still have to comply with this directive.

What if the UK left the EU without any form of free trade agreement? (the WTO option)

The UK would be free to revise its media regulatory framework and deviate from EU standards.

Telecoms businesses

Current state of play

Telecoms regulatory framework

The current EU regulatory framework is a package of five directives and two regulations which has the following aims:

- promotion of competition in the telecoms sector by regulating access and fees for certain landline and mobile infrastructure - in this regard the Commission has the power to veto certain measures proposed by national regulators;
- reduction of costs for deploying high-speed electronic communications networks and investments in broadband networks supporting high-speed internet and regulation of the use of wireless technologies, such as 3G and LTE;
- consumer protection, in particular with regard to end-user contracts and transparency; and
- harmonisation and abolition of roaming charges within the EU by 2017.

'Connected Continent' legislative package

Pursuing the goal of a European 'Digital Single Market', the Commission has proposed legislative changes to the existing telecoms regulatory framework which, amongst others, include:

- new criteria for regulating telecoms markets so that national regulators would have to consider competitive issues arising from 'over the top' players (ie companies that enable people to make voice calls and send messages over the internet); and
- a harmonised set of rules on net neutrality in order to prohibit discriminatory blocking and throttling of network traffic - only certain content providers (so-called specialised services which rely on higher network performance) will, under certain circumstances, be able to agree deals with internet providers to assure a certain quality of service and thus obtain premium network access. Currently, there is a mixed bag of domestic net neutrality regulation in the EU. Member state approaches range from strict rules on net neutrality (eg the Netherlands) to compromise solutions (eg France) to no regulation on net neutrality at all (eg Germany). The UK regulator, Ofcom, pursues a self-regulatory approach and recognises that innovative internet-based services may require priority network access.

Broadband strategy

- The Commission recently released the 'Investment Plan for Europe', a package of measures to unlock public and private investments of at least EUR 315 billion over the next three years (2015-2017) with a strong focus on digital infrastructures, notably broadband.

What should I be thinking about now?

Telecoms regulatory framework

Would Ofcom have more leverage when it comes to access and fee regulation, being unconstrained by Commission veto rights?

Roaming

Would the UK be able to deviate from the EU roaming regime and introduce roaming charges? Conversely, would EU member states have greater freedom to allow roaming charges to be imposed as regards UK customers?

Net neutrality

Following a Brexit, it might be possible for content providers in the UK to negotiate a broader range of arrangements with internet providers regarding paid priority access, whereas the same business models might be under closer scrutiny in some member states, in particular once the envisaged harmonised EU rules on net neutrality take effect.

Infrastructure

As regards the EU broadband strategy, UK firms may not have access to the new EU fund for financing high-speed broadband roll-outs or other digital networks.

What could the position be following a Brexit?

The answers to many of the above questions would depend on the nature of a post-Brexit UK/EU relationship.

To give an idea of the range of possible outcomes we have considered what the position would be under the 'Norwegian option' and the 'World Trade Organisation (WTO) option' – on the basis that these are at opposite ends of the spectrum of existing models for an alternative relationship with the EU.

What if the UK leaves the EU but joins the European Free Trade Association and remains part of the European Economic Area (EEA)? (the Norwegian option)

The four freedoms as laid down in the Treaty on the Functioning of the European Union (ie the free movement of goods, services, persons and capital, as well as competition and state aid rules) are incorporated in the EEA Agreement. This means that the telecoms directives are applicable throughout the EEA. Hence, nothing would change since the UK would still have to comply with this directive.

What if the UK left the EU without any form of free trade agreement? (the WTO option)

The UK would be free to revise its telecoms regulatory framework and deviate from EU standards.

Thank you