

# Key Legal Brexit Issues for Retailers

July 2016

Uncertainty has dominated the reaction of the retail market to Brexit. Whilst most retailers are therefore adopting a "wait and see" approach, there is a general consensus that retailers that import heavily will be most affected. It is expected that Brexit will create a number of new barriers to trade. The legal environment will become more complex as retailers will lose the benefit of access to the common market affecting the supply chain, IP, movement of workers, transfer of data and international contracts. In this article the Retail group of Dentons looks at key issues faced by UK retailers.

## Supply chain and product import

"The basic fact is the more you import, the greater an issue Brexit will be."<sup>1</sup> Retailers that import product from within the EU need to prepare for new rules on VAT, import duties and tariffs and the reduced buying power of sterling. It is hoped that some of these disadvantages can be set off by better free trade agreements between the UK and major non-EU economies such as India and China. However, from a legal compliance perspective it is certain that the regulatory burden and complexity of the supply chain will increase. The next two years will be a period of uncertainty as retailers have to decide whether to wait for the outcome of exit negotiations before restructuring their supply chain. As the UK leaves the common market, the VAT zero rating of intra-EU purchases will disappear, potentially adding significantly to the costs of imported goods. In addition it is possible that there could be import duties on products sourced from EU countries.

### *Examine supply contracts*

Retailers need to examine existing supply contracts to consider how and when they can be terminated or

renegotiated. Where possible, retailers may wish to terminate long-term contracts and replace them with shorter-term agreements allowing more flexibility during this period of change and uncertainty. Another potential option some are considering is whether it may be possible to invoke force majeure provisions to end potentially onerous contracts such as purchasing agreements with Euro pricing. A further area to examine is the way in which compliance with law clauses are drafted, and, in some agreements, whether there may be change in law clauses, which set out which party takes the pain of legislative changes.

### *Increasing regulatory burden*

Whilst importing from some non-EU countries, on the other hand, may become easier, retailers may have to go back to pre-War style import departments to cope with the paperwork. Some retailers are already identifying countries with a strong treaty network and may begin to channel certain product supplies via those countries to minimise import duty. Legal issues associated with importing from outside the EU include the need to comply on a per-country basis with a different set of rules regarding matters such as certificates of origin, safety certificates, import permits and licences. Currently the EU takes care of that. Retailers will need to build their knowledge of import

---

<sup>1</sup> Debenhams Chairman, Sir Ian Cheshire, in *Retail Week*, 1 July 2016

export laws and may have to increase head count in this area.

## Competition law

EU competition law will cease to apply to distribution networks, franchise agreements, online sales and supply agreements in the UK. This could be seen as good news as retailers may now be able to ring-fence the UK market. However, when trading in Europe, EU competition law will continue to apply to the operations of UK retailers because competition law applies to trading in the target market regardless of where the retailer's head office is located. In addition current UK competition law is based on EU law so the immediate benefits will be very limited. As the countries drift apart over the years, it is expected that the competition law landscape in the UK will start to change. EU precedents will no longer be binding on the UK courts and the regimes will likely begin to diverge. For UK retailers, a new UK regime may well bring better controls over online sales, key word advertising and exclusive customer groups but for international retailers a dual regime may evolve requiring them to have one set of policies for the UK and another set of policies for Europe.

Retailers with operations in Europe will continue to be bound by the EU regime. EU-based franchise stores will continue to have the right to sell online to any buyer from any EU country but the grey market for supplies from cheaper EU markets into the UK could be shut down, allowing UK retailers to maintain a higher price level domestically without fear of competition from other distributors of the same product range.

Retailers will need to evaluate the impact of these changes on their business model.

## Enforcing international agreements

Many international agreements are governed by English law and subject to the exclusive jurisdiction of the English courts. At present, disputing parties within the EU can look to two main EU regulations to identify which courts will have jurisdiction over a dispute, which law will be applied and how a judgment will be enforced. Going forward, these EU regulations will no longer apply. Enforcing a UK judgment in EU Member States may, in the future, depend on bilateral treaties between the UK and the other EU country or on any new arrangement that the UK may be able to negotiate with the EU. It is also possible that the UK may sign the Lugano Convention between the EU and certain EFTA countries on the enforcement of foreign judgments.

The position regarding the choice of English law as the governing law, on the other hand, is unlikely to change. English courts will continue to apply English law and EU courts will continue to respect the choice of law made by the parties provided always that the contract has a connection with the UK. However, if the retailer is based in the UK, this will constitute sufficient connection, so the concern arises principally for foreign parties that have chosen English law as a neutral law.

The bigger issue is thought to be the enforcement of UK court decisions. Potentially solutions include the choice of non-exclusive jurisdiction, changing jurisdiction to the courts of a Lugano Convention country such as Switzerland, and opting for arbitration as the preferred dispute resolution mechanism.

## The effect of Brexit on international transfer of data

Currently UK businesses are free to import personal data from other EU countries without the need for special authorisation. A UK withdrawal from the EU is likely to mean (at least temporarily) a loss of its position as a member of the EEA as well. In this case, the UK would need to ask the European Commission for an "adequacy" decision, to allow for the continuing transfer of personal data from the remainder of the EU to the UK. Another option could be for a UK version of the US "Privacy Shield".

It is unclear how quickly an adequacy decision would be made or even whether the UK would qualify for one. This is due to claims about UK national security measures eroding the right to privacy in the UK. The *Schrems* case (which concerned the US failing to adhere to European data protection standards as Facebook allegedly transferred consumers' personal data to the US National Security Agency) could apply to the UK. *Schrems* led to the Court of Justice of the European Union (CJEU) ruling that "adequate" safeguards for the protection of data were not met.

In light of this uncertainty, once Brexit has been triggered, any retailer with operations in an EU country would be likely to need to enter into model contracts (or another data transfer solution) to be able to continue the transfer of personal data from Europe to the UK.

## Protecting your IP

It seems inevitable that an unintended consequence of Brexit will be that the protection of intellectual property rights will become more expensive for retailers. In short, at present all 28 EU Member States benefit from a range of EU-wide intellectual property regimes such

as EU trade marks and registered community designs. Some intellectual property is centrally managed – such as trade marks administered by the European Intellectual Property Office (formerly OHIM). For retailers that own or license intellectual property across a variety of European countries, these regimes are cost effective.

### *Patents*

Plans were well advanced at the time of the EU referendum for a Europe-wide unitary patent, which meant that a single patent application would cover most European countries. This will generate massive cost savings. Post Brexit, retailers will need separate UK and EU protection to cover all territories for their inventions and innovations.

### *Trade marks and designs*

Currently, trade mark and design protection is available across all 28 Member States with a single EU trade mark (the EUTM, which was formerly called the CTM) and Community designs. In the future, national UK trade marks will need to be maintained separately from the EUTM and so retailers will need to budget to spend more money in order to protect their trade marks and register in both the UK and the EU rather than just in the EU. It is likely, however, that there will be some form of transitional regime to deal with any existing EU trade mark portfolios (which would currently cover the UK) to enable those trade marks to retain or obtain protection in the UK once it leaves the single market.

Another issue for franchisors to consider is the impact of changes to the current system for registering their trade marks with customs authorities in the EU to help prevent the importation of counterfeit products. It will be important in future to ensure that both national and EU rights are registered with customs. It remains to be seen whether there are other enforcement issues looming as it is not clear whether the UK will continue to have access to the Enforcement Database, which contains information on products that are granted an intellectual property right (such as a registered trade mark or design). At present, police and customs officials of all 28 Member States can access this tool to view information and product details, making it easier for them to identify counterfeits and take action.

### *Copyright*

Many retailers and most franchise systems rely extensively on copyright to protect their operations manuals, logos, unregistered trade marks, databases and software. Given the cross-border nature of franchising, most franchisors and franchisees wish to rely on a broad range of cross-border intellectual property protection to deal with copyright infringers.

Copyright has also become increasingly important as retailers have moved towards omnichannel strategies and invested significantly in IT platforms. Copyright is central to protecting the implementation of digital channels.

Many domestic copyright laws in the UK stem from EU laws and the various Member States of the EU have increasingly aligned their approaches over time. Courts in the UK interpret such laws consistently with decisions of the European Court of Justice.

The effect of Brexit on copyright is still unclear. We recommend that franchisors monitor changes to the enforcement regimes. This is especially so with the notice and take down processes, which are at present operated by online hosts in response to court orders or allegations that certain content is illegal.

### *Trade secrets*

In April 2016, the European Parliament had approved the new European Union Trade Secrets Directive, which is designed to protect trade secrets. The new law has been of great interest to retailers as confidential information forms the basis of most franchise systems and can be notoriously difficult to protect.

It now seems certain that the UK will not be enacting any national laws to implement the new Directive and so the UK law and European law will continue to diverge. Retailers should, in the meantime, ensure that their confidentiality agreements comply with both UK and European laws. Retailers should ensure they have contractual rights in the franchise agreement to provide protection against unlawful uses of their trade secrets as they will not be able to benefit from the new Directive.

### **Impact for EU workers and employment laws**

Stopping the free movement of EU workers was a key factor in the Brexit vote. It is unlikely that the EU will allow the UK to close its borders to EU workers whilst allowing UK workers full freedom of movement in Europe. Retailers that have UK nationals in Europe supporting their local stores may need to apply for work visas and residence permits. Retailers that employ EU workers in their UK stores may face significant change. According to a migration study by Oxford University 8 per cent of workers in the retail and leisure sector are from other EU countries. If visa requirements come into force for EU workers already based in the UK, many of these workers may have to leave or retailers could be faced with making multiple visa applications for their UK-based staff. Whilst this might create jobs for UK citizens, retailers will have a significant task ahead of them restructuring their workforce and complying with any new visa regimes.

## So what happens next?

Nothing immediate is the answer. It all depends on how the UK negotiates its exit and future relationship with the EU. Those European nationals who have been in the UK for some time may lose their right to work in the UK. A change in regulations that govern the rights of European nationals has fuelled this concern. In November 2015 European nationals lost the automatic acquisition of permanent residence after five years exercising treaty rights in the UK. Now a European national must make a formal application for confirmation of permanent residence. As a result recent arrivals would appear more at risk than long-standing residents.

## Potential legal changes

Whilst the risk of loss of 8 per cent of the workforce would appear to be a significant negative consequence of Brexit for retailers, positive changes for employers are also expected by some in the form of deregulation in areas such as discrimination, working time regulation, health and safety and the rights of employees on the transfer of a business, all of which are based on the laws of the EU. Whilst it is unlikely that the UK government would simply repeal all of these laws, it would no longer be bound by EU minimum standards. There may well be political pressure to offset the costs of employing a domestic workforce with some relaxation of legal requirements. Aspects of employment law that could come under scrutiny include TUPE and the rules that apply to how holiday pay is calculated. The European Agency Workers Regulations, giving agency workers many of the same rights as permanent employees, have also been unwelcome in the UK.

It would not be right to say that EU legislation has been the sole driver behind changes in UK employment laws, but politicians in support of Brexit have indicated that they are in favour of less EU-based red tape and jurisprudence. Therefore, legislative changes and new case law might be on the horizon that could benefit retailers.

## Action plan

Retailers should put together an action plan to address the legal impact of Brexit on their business. Key legal issues to consider would include:

- Impact on your European supply chain. Review long-term supply agreements and consider termination options and force majeure clauses.
- Impact on your intellectual property. Leaving the EU will mean that the European trade mark is no longer valid in the UK. Retailers will need to review their IP portfolio and filing strategy.
- Impact on staff. Establish the extent to which your business is reliant on EU workers and consider what a two-year transition plan might look like.
- Impact on international contracts. Retailers should review jurisdiction clauses in their international agreements.
- Impact on data privacy. Retailers should put in place new measures to enable them to continue the use of personal data from EU sources.
- Impact on competition law. Retailers could benefit from a better ability to ring-fence their domestic market but will continue to be bound by EU rules where they trade in EU Member States.

*Our Retail group is available to support and advise our retail clients on what Brexit means for you, and what steps can be taken in both the immediate and the longer term.*

*We are offering workshops to delve into this subject further, and are happy to host sessions specific to your firm only, if this would be of interest. Please get in touch if you would like more information.*

## Contacts

### **Babette Märzheuser-Wood**

Partner, London

D +44 20 7246 7053

[babette.mwood@dentons.com](mailto:babette.mwood@dentons.com)



### **Scott Singer**

Partner, London

D +44 20 7320 6599

[scott.singer@dentons.com](mailto:scott.singer@dentons.com)

