Brexit Insights – setting the scene

At present, the only thing that appears certain about Brexit is the uncertainty that it poses for UK and EU businesses.

The **referendum** on the 23rd June will determine whether the UK should remain part of the EU or whether it should leave; but it will not determine the kind of **alternative relationship** the UK might have should voters decide to vote 'leave'. Given the uncertainty of what an alternative to EU membership might be, it is difficult to accurately gauge what the real impact of Brexit might be for businesses, with the 'Norwegian model', the 'Swiss model' and the 'WTO model' all being touted as potential alternatives to the UK's current relationship with the EU with some commentators also calling for a bespoke deal with the EU (each of which are more fully explained at the end of the document).

This note sets out an inexhaustive summary of the potential **legal** ramifications for businesses should Brexit occur.

Legislative impact: overall impact on the legal system

Should the UK vote 'leave' the legislative impact in the short to medium term could be **significant**, with legal advisers being the main beneficiary, as the UK government attempts to **unravel** decades of EU legislation.

The extent of this 'unravelling' will ultimately depend on the post-Brexit model that is adopted; the adoption of the 'Norwegian' model for example, would leave limited scope for a wholesale review of **legislation**.

A repeal of the European Communities Act which brought the UK into the EU would only assist in removing the regulations passed under it; EU directives which have been incorporated by way of an Act of Parliament would require specific repeal.

The extent to which English courts would regain **sovereignty** from the Court of Justice of the European Union ('**CJEU**') is also dependent on the post-Brexit model that is adopted; the 'Norwegian model' for example would leave the UK bound by the decisions of the European Free Trade Association ('EFTA') Court which in the vast majority of cases, follows the decisions of the CJEU.

Given the question marks concerning the status of EU legislation and CJEU judgments following a Brexit, questions may also arise as to what actually constitutes 'English law' and whether English law would remain an appropriate **governing law** of choice. It is arguable however that the principles of English contract law will largely

remain unaffected by a Brexit. The basis for forming, interpreting and avoiding contracts should remain the same as these concepts are derived principally from English **common law** and are independent of EU law.

EU legislation, namely the **Recast Brussels Regulation** ensures that the courts of each Member State respect the autonomy of commercial parties to determine the appropriate **jurisdiction** in which to bring a claim, and assists parties in obtaining recognition of their **judgments** in the courts of other Member States. Similarly, the **EC Insolvency Regulations** ease recognition of an insolvency proceeding between Member States. If these regulations or similar legislation were not to remain in place post-Brexit, it could add considerable **administrative and legal** costs for counterparties. However such a scenario seems fairly unlikely given the benefits of these rules to **both** UK and EU counterparties.

Financial regulation

Lost your passport? The rules which govern **passporting** allow financial institutions which are authorised in their home country to provide services and products in another Member State without the need for further authorisation and have generally eased the way in which financial institutions do business and raise funds. The potential loss of this benefit could add a considerable **regulatory and administrative** burden to UK financial service providers. At the same time, with the UK being by far the largest centre for 'foreign' branches of banks in the EU, it is perhaps unlikely (at least in the short term) that the EU would want to cause considerable disruption to their own financial institutions by removing this benefit – of course pressure from **Dublin and Frankfurt** may be a determining factor on the issue of passporting.

Not all rules and regulations which govern financial institutions emanate from the EU and under a WTO model the UK would still remain bound by **international standards** adopted by the G20, the Financial Stability Board and the Basel Committee which affect, amongst other things, the central clearing of derivatives and capital adequacy ratios. Post-Brexit the UK may find that it domestically has more of a **voice** in influencing these bodies, being unconstrained by EU solidarity; conversely, internationally, it may find that its voice simply gets drowned out by that same EU solidarity.

The Norwegian model, at present, would still require UK financial institutions to comply with the bulk of EU legislation i.e. the **prudential supervision of banks** (CRD IV and CRR), **investment firms** (MiFID II and MiFIR) and **insurers** (Solvency II).

Under a Swiss/WTO model it is unclear how much regulation would actually change given that UK regulators have some precedent for **gold-plating** EU regulations e.g. most of the CRR and MiFID II. The **hedge fund** sector will perhaps be the one sector which actually finds itself being less heavily regulated.

Of significant concern for **traders** will be the prospect that should the UK exit from the EU, the EU would be free to draft legislation which erodes the status of the City of London as a global financial centre. The UK government previously blocked a proposal from the European Central Bank which would have prohibited regulated **clearing houses** for Euro-denominated financial products from being located outside of the **Eurozone**. If Britain was absent from the negotiating table, there may be little to prevent the EU from repeating those efforts. Conversely,

if the UK remained in the EU, there is no guarantee that it would be able to block further legislation impacting the City in any event, the failure to block the cap in bankers' bonuses being a case in point.

Employment

EU employment laws and the decisions of the CJEU have been an area which has attracted some criticism and derision from UK businesses, with the EU's competence for legislating in this area and the outcomes that have followed EU legislation being called into question. The EU's **Working Time Directive** and the **Temporary Agency Workers Directive** are prime examples of legislation which some have considered as having gone too far. While the UK has **opt-outs** for various elements of legislation, there are concerns that such opt-out provisions could be threatened in future reforms. Should the UK **remain** in the EU, the prospect of the EU implementing legislation which further regulates the employer/employee relationship is not beyond doubt.

With the UK having had high standards of health and safety legislation even prior to EU rules being implemented, it is not entirely clear however whether social and employment legislation has **created costs** through restrictive rules and regulations, or actually **reduced costs** for UK business by harmonising the internal market. It is also difficult to know what legislation the UK would have adopted had it not been in the EU and furthermore what legislation it would repeal were it to leave the EU and adopt the **WTO** model.

Whether employers would have better access to **talent** is also open to debate. On the one hand, a complete exit from the EU could mean that the UK would no longer be as limited in attracting skilled workers from outside of the EU. At the same time, Brexit could reduce the ease in which EU **workers** can come to the UK to work and correspondingly it could restrict UK businesses by hindering the ease with which their employees can work in the EU.

Competition

In contrast with EU employment rules, EU rules on merger control and behavioural competition are generally viewed as being one of the great successes of the EU; creating a level playing field for business. The benefits of EU rules on **state aid** are perhaps open to more debate - particularly in recent months, given the calls for the government to nationalise UK **steel producers**.

If the UK were to adopt the Norwegian model, it would have to apply the same substantive competition and state aid rules as it does currently, with enforcement being conducted by either the **EFTA Surveillance Authority** or the Commission. The Swiss model in contrast enforces its own version of competition law but state aid is still prohibited by Switzerland's **free trade agreements** with the EU.

It is unlikely that competition law would vary substantively if the UK had its own **independent regime**. Such a regime would never be completely independent given the EU's ability to block mergers between two non-EU companies. Further, the example of Switzerland also suggests that state aid is likely to be prohibited under any future trade agreement with the EU and even without such prohibition whether state aid would be granted would ultimately depend on the **policies** of the government of the day.

Alternatives to EU membership

Norwegian model

This would involve the UK remaining part of the European Economic Area and continuing to participate in the internal market. The UK would be bound by the majority of EU legislation where it relates to the single market but would not have any say in its development and would also be required to contribute to the EU's budget and accept the free movement of people. The UK would however not be bound by EU policies such as justice and home affairs and fisheries and agriculture which are outside of the scope of the Norwegian model.

Swiss model

Under the Swiss model, the UK would enter into a series of bilateral agreements with the EU dealing with trade, financial services and free movement of persons. Under the Swiss model, the UK would still be required to contribute to the EU's budget and have regard to most EU legislation in return for market access.

World Trade Organisation (WTO) model

The WTO model is a trade model under which the UK would be exempt from most EU legislation. Under this model, the UK would be required to comply with the standard WTO rules for access to the EU market and comply with the 'most favoured nation' principle. The principle requires that any benefit which is offered to one trading partner should be offered to all other WTO members, unless that benefit is pursuant to a preferential trade agreement.

Bespoke agreement

A bespoke agreement would involve the UK negotiating a free trade agreement with the EU. Such a model could take many years to negotiate and it is difficult to predict the levels of integration that such a deal might involve.