Brexit Update

March 2019

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SPECIAL REPORT

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BREXIT: CHALLENGES AND OPPORTUNITIES

In this report, we explain some of the key legal implications associated with the United Kingdom leaving the European Union (**EU**) without a deal for future relations being agreed between themselves. This note assumes that, in the event of no agreement being reached, the UK and EU will trade on the basis of World Trade Organisation (**WTO**) rules. Any reference to "no deal" in this report should be understood as being a reference to trading on WTO rules in place of a formal deal between the EU and the United Kingdom. This note aims to provide clients with a degree of reassurance amidst the prevailing uncertainty that the prospect of a "no deal" Brexit brings. The topics covered include (i) banking and financial services, (ii) tax, (iii) contracts and enforceability of judgements, (iv) employment law, (v) data protection and (vi) health care regulation.

Many businesses remain hopeful that either a form of transitional agreement governing temporary relations between the United Kingdom and EU (**Withdrawal Agreement**) will have been agreed and ratified by the time the United Kingdom leaves the EU at the end of the extension recently agreed between the EU and the United Kingdom beyond the original designated departure date of March 29 2019 (such extension being referred to in this report as **Brexit day**) or, failing that, that the Article 50 process will be revoked before Brexit day. The current draft Withdrawal Agreement negotiated between the UK Government and the EU has already been rejected twice by a historic majority of UK MPs in two sets of parliamentary votes, mainly due to concerns over a backstop plan to avoid a hard border between Ireland and Northern Ireland. A third parliamentary vote will not be possible unless a new, substantially different Withdrawal Agreement is put forward. Meanwhile, the European Council has agreed to extend the UK's departure date to 22 May 2019 as long as the current draft Withdrawal Agreement is approved by the UK Parliament during the week commencing 25 March. Should Parliament reject the Withdrawal Agreement for a third time (which seems likely), the European Council will allow the departure date to be delayed until April 12 2019 and expects the UK to indicate a way forward for consideration by the European Council before then.

On the face of it, this extension should give the UK more time to consider its options. However, a "no deal" Brexit is still possible. In addition, the opposition Labour Party has introduced the possibility of a second referendum or "People's Vote" into the mix, a decision largely prompted by a group of MPs splitting off from the two main political parties and forming a new temporary alliance (known as the Independent Group) in protest at the Brexit negotiation process. With the political situation changing daily, and with Brexit Day getting closer, the need to prepare for a "no-deal" Brexit has become increasingly important.

Given the political and macroeconomic uncertainty created by this situation, businesses will need to prepare for a "no deal" scenario regardless of the actual outcome. That said, while it is important to be mindful of the challenges associated with a "no deal" Brexit, the opportunities should not be overlooked. In this vein, we hope that this report will encourage clients to plan effectively and to make informed decisions for their businesses based on a balanced and objective set of criteria, rather than fear of the unknown.

LEGISLATIVE FRAMEWORK

The United Kingdom has already implemented legislation to address the consequences of Brexit, including a "no deal" scenario. The EU (Withdrawal) Act 2018 (**EU(W)A**), amongst other things, preserves all existing UK laws in force prior to Brexit day that are derived from EU law (including EU Regulations and Directives), meaning that the United Kingdom will continue to apply those rules in relation to the EU Member States as if Brexit had not happened. EU law principles of interpretation will continue to apply to such pre-Brexit day UK laws, where applicable. Post-Brexit day, EU law will cease to have supremacy over any post-Brexit day UK laws, and the United Kingdom will no longer be bound by existing EU law principles or case law regarding their interpretation, although it may have regard to the decisions of the Court of Justice of the European Union (**CJEU**).

From the EU's perspective, EU Member States would have to treat the United Kingdom as a "third country" for EU law purposes post-Brexit day and EU Directives and Regulations would no longer apply to the United Kingdom post-Brexit day.

BANKING & FINANCIAL SERVICES

Financial Passporting

A key benefit of membership of the EU is financial passporting. This means that lenders, funds and financial institutions authorised in the United Kingdom are able to conduct business within other European Economic Area (**EEA**) states based on their "home" Member State authorisation without obtaining a licence in each individual country.

Post-Brexit day, passporting will no longer be available in its current form. At the time of writing, it is not certain what the future position will be regarding the conduct business between United Kingdom firms and other EEA states.

The ending of financial passporting rights will affect:

- lenders, funds and financial institutions based in the United Kingdom that conduct business in the EEA; and
- lenders, funds and financial institutions based in the EEA that carry out certain types of business in the United Kingdom

The nature and extent of any post-Brexit "passport" for UK-based firms will depend in large part on which model of relationship is agreed on between the United Kingdom and the EU:

- EEA/Norwegian model: passporting arrangements included
- Swiss/Canadian model: depends on the negotiations
- WTO model: no passporting rights of any kind

The extent to which Brexit will affect any entity will depend upon the relevant regulatory regime and should be assessed on a case-by-case basis (with particular reference to the type of institution and the jurisdiction(s) within which it operates). However, in a WTO model "no deal" scenario, the following ramifications can be expected:

Retail Clients

- A bank established in the United Kingdom will only be able to conduct regulated investment business with a retail client in an EEA state if the bank has established a branch in that EEA state (*subject to the temporary permissions regime – see below*).

In order to establish a branch, the authorities in that EEA state would need to be satisfied that the United Kingdom benefitted from adequate regulation in certain key areas, such as anti-money laundering and the countering of the financing of terrorism. Cooperation and tax arrangements would also need to be in place between the two countries. The United Kingdom should meet all these requirements post-Brexit.

Professional Clients

- A lender, fund or financial institution established in the United Kingdom seeking to do business with professional clients in an EEA state will be able do so without establishing a branch in that Member State if it is registered in a register maintained by the European Securities and Markets Authority (**ESMA**)
- Such ESMA registration is only possible where the third country regulatory regime is considered equivalent and a decision to this effect has been adopted by the European Commission (known as an "equivalence decision")
- Until an equivalence decision can be obtained, UK-based firms lose their passports and therefore cannot deal with EEA-based clients (*subject to the temporary permissions regime – see below*). To continue to do business, they would need to set up a subsidiary in an EEA state

Temporary Permissions Regime

To minimise disruption in the event that no Withdrawal Agreement is entered into between the United Kingdom and the EU prior to Brexit day, the UK treasury has put forward legislation to provide financial services regulators with a power to phase in post-exit requirements. This should allow flexibility for lenders, funds and financial institutions to transition to a fully domestic UK regulatory framework. However, it should be noted that (at the time of writing) the EU has not publicly committed to plans to address market access or other issues arising from a "no deal" scenario and/or no transition period – so firms should continue to prepare for a total loss of passporting rights.

If the legislation is passed, the temporary permissions regime will allow EEA-based firms passporting into the United Kingdom to continue new and existing regulated business within the scope of their current permissions in the United Kingdom for a limited period. This will allow them to seek full authorisation from the UK's Financial Conduct Authority (**FCA**). EEA-domiciled investment funds that currently market in the United Kingdom under a passport will be permitted to continue temporarily marketing in the United Kingdom.

The temporary permissions regime will only be put in place if there is no implementation period and the passporting regime falls away when the United Kingdom leaves the EU. This should act as a backstop to ensure lenders, funds and financial institutions can continue their business with minimal disruption.

It is expected that this temporary permissions regime will be in place for a maximum of three years (although it could end as soon as the end of 2020). Firms and funds need to notify the FCA that they want to enter the regime and obtain a temporary permission by **no later than March 28 2019**.

It should be noted that this temporary permissions regime will not be available to all lenders, funds and financial institutions. This protection will not be available to certain entities, including:

- firms subject to the MiFID II transaction reporting regime (and connected persons)

- firms subject to reporting obligations under European Market Infrastructure Regulations (EMIR)
- EEA Issuers that have securities traded or admitted to trading on UK markets; and
- investment firms subject to the Bank Recovery and Resolution Directive (**BRRD**) and that have liabilities governed by the law of an EEA State.

LMA Facility Documentation

The Loan Market Association (**LMA**) published a note on September 12 2018 which focused on possible solutions for adapting business operations in the event of a "no deal" Brexit. A key risk is that institutions which are party to LMA facility agreements and rely on passporting rights may find themselves in breach of local licencing requirements either by being party to the relevant documentation or by carrying out the activities envisaged in such documentation.

Potential Mitigation

The LMA has not yet proposed any changes to its suite of documents, but it has advised that parties to LMA documents might want to consider the following to meet licensing requirements:

- the ability to transfer the relevant rights and/or obligations under existing facility documentation to an appropriately licensed affiliate
- the ability for an institution to change the branch through which it acts under the existing facility documentation to an appropriately licensed branch
- contractual rights to exit the transaction under illegality protections; and
- the ability to control the accession of additional members of the borrower group to existing lending arrangements

The extent to which any of these possible measures will assist needs to be assessed on an institution and jurisdiction specific basis.

Potential Adjustments to Facility Documents

In their note, the LMA considers the following potential adjustments that parties could make to the facility documentation, although there are no immediate plans by the LMA to introduce any of these adjustments to their template documents.

- Tranching structures

If money is lent to a group spread across different jurisdictions (where some lenders and borrowers may be impacted by the loss of passporting rights), facilities could be structured into a number of different "tranches" to be made available to different members of the borrower group (effectively ringfencing specified portions of a facility to certain borrowers and lenders only). If this approach is taken, it will be important to assess how to categorise the availability and the amount of the tranche which may be impacted by the loss of the passporting rights.

- Fronting structures

The facility could be structured so that the lending which may be impacted by the loss of passporting rights is carried out by a single appropriately authorised "fronting" lender (noting that suitable back-to-back funding arrangements between the fronting lender and the rest of the syndicate would need to be put in place). Parties taking this approach should be mindful of the intra-lender credit risk associated with the back-to-back funding arrangements, and the extent to which a fronted lending structure will satisfy the licensing requirements.

- Illegality clause

Illegality clauses allow for a lender to exit the loan and be prepaid if it becomes unlawful for it or any of its affiliates to fund or maintain the loan.

More flexibility could be built into the illegality clause by expanding its application to instances where an institution reasonably considers that illegality may result from its maintenance of a loan (however, this will affect the standard risk allocation approach between lender and borrower and should be considered very carefully on a case-by-case basis).

- Facility agent resignation

A facility agent's ability to appoint a successor, which is usually limited by a requirement that any such successor be operating through an office in a specified jurisdiction(s), could be made more flexible by expanding the range of specified jurisdictions or by providing a more flexible location qualification (i.e. ensuring that the new agent will not be prejudicial by having the fullest passporting rights for the deal, on a case-by-case basis).

- Account banks

Greater flexibility could be introduced by allowing the bank accounts required to be maintained by the borrower group under the LMA facility documentation to be held with other willing institutions in suitable jurisdictions (provided that they are acceptable to either the security agent or the relevant secured parties). This may increase the credit risk. Whether such increase in credit risk is justified will need to be considered on a case-by-case basis. Additionally, any institution which agrees to maintain such an account should satisfy itself that it can meet any of the applicable regulatory requirements associated with doing so.

Controls on borrower accession

Where the LMA facility documentation requires the consent of a specified group of lenders (but not all lenders) for the accession of a new borrower, greater protection could be introduced by preventing the accession of new borrowers or by requiring the consent of all lenders. If this approach is considered, it will be important to assess how those new borrowers should be categorised and whether parties to the existing agreements can accept a reduction in flexibility around these arrangements.

- Mandate letters and commitment letters

Mandate letters and commitment letters could be supplemented by including mechanics allowing for a transfer of the mandate/commitment to an institution's appropriately licenced affiliate. Alternatively, the institution could be allowed to change the branch from which the mandate/commitment is performed to a branch with the appropriate licencing.

Market Abuse

- The EU Market Abuse Regulation (MAR) came into force on July 3 2016.
- The MAR ensures that rules keep pace with market developments, such as new trading platforms, as well as new technologies, such as high frequency trading. The new Directive on Criminal Sanctions for Market Abuse (or **Market Abuse Directive**) complements the MAR by requiring Member States to introduce common definitions of criminal offences of insider dealing and market manipulation, and to impose maximum criminal penalties for the most serious market abuse offences. Member States have to make sure that such behaviour, including the manipulation of benchmarks, is a criminal offence.
- Going forward, the United Kingdom may have possibilities to provide more freedom

to businesses in comparison with MAR, but, realistically, it is probable that the UK's regime will be substantially similar in the future, given that the EU is likely to require a comparable system to MAR to access the EU single market.

TAX

Holding Companies

Traditionally, multinational groups have often used UK holding companies to hold their EU operating companies to facilitate a tax-efficient repatriation of cash to shareholders or the ultimate parent company.

The UK's regime compares relatively favourably with other commonly used holding company jurisdictions, mainly due to lack of a dividend withholding tax, but also in part due to the UK's extensive network of double tax treaties. Generally, Brexit is not expected to have a significant impact on the current UK tax regime for holding companies, although it may produce certain traps for the unwary, namely:

- EU source withholding taxes are increasingly likely to become a cost

Post-Brexit, EU-based operating subsidiaries may seek to impose withholding taxes on EU source dividends, interest or royalties paid to a UK holding company, since EU subsidiaries will no longer be obliged post-Brexit to apply the EU Parent-Subsidiary Directive (2011/96/EU) (**PSD**) or the EU Interest and Royalties Directive (2003/49/EC) (**IRD**) in relation to UK holding companies. As such, there may be withholding tax costs associated with cash repatriation from the EU to the UK in the form of dividends, or under intra-group financing or IP licensing arrangements. Such taxes may be reduced or eliminated under an existing double tax treaty, although UK treaty rates for dividends are usually 5% or 10%. It is expected that the UK treaties with Luxembourg, the Netherlands, Belgium and Switzerland will be amended to preserve the benefits of the PSD, although it is not yet clear whether and to what extent other EU Member States will align their treaties with the UK to preserve the current position under the IRD or PSD.

- UK companies within corporate groups may no longer be eligible for fiscal grouping in accordance with an EU Member State's fiscal unity or tax consolidation rules post-Brexit day, since eligibility for fiscal grouping typically requires tax residence in an EU or EEA Member State
- Post-Brexit day, UK-parented EU companies receiving US source income may no longer be eligible for benefits under the "EEA equivalent beneficiary" rules of the "Limitation of Benefits" Article of the applicable double tax treaty with the US

UK law currently imposes a 1.5% Stamp Duty Reserve Tax on issuances of UK shares and securities to depositary receipt issuers and clearance services. However, as a result of the Capital Duties Directive (2008/7/EC) and decisions of the CJEU and UK First-Tier Tribunal, HMRC announced that it would no longer seek to impose this charge. Post-Brexit day, the UK Government would be free to impose this stamp duty charge. It could also impose a new capital duty on fundraising activities, although that is not something that the UK Government is considering at this stage.

Operating Companies

Generally, the UK corporation tax environment for operating companies is likely to remain relatively competitive post-Brexit, particularly for large companies that own significant amounts of IP and conduct research and development (**R&D**) activities. It is therefore likely to be of particular interest to companies in the health care, pharmaceutical and technology sectors, for the following reasons:

- The corporation tax rate is set to change from its current rate of 19% to 17% from 1 April 2020, which is significantly below the OECD average (around 24.18%)

A potential down side, however, is that a low corporation tax rate may increase the likelihood of a UK company being viewed as a (low-taxed) CFC from the perspective of certain overseas investor jurisdictions such as Japan, and possibly also some EU Member States, particularly if they have implemented the Council Directive 2016/1164 (known as the Anti-Tax Avoidance Directive, or ATAD I) (All EU Member States, including the UK, must implement ATAD I into their national laws by 1 January 2020). Such a concern may potentially be eliminated if there are "significant people functions" in the UK – which again may be helped by the UK's generous tax environment for R&D.

- Large UK operating companies may also benefit from generous R&D tax reliefs, as well as an effective 10% rate on profits from certain patent-derived income (known as the "UK patent box")

In broad outline, large UK operating companies that incur tax-deductible expenditure on R&D may be eligible for a refundable tax credit under the Research & Development Expenditure Credit (**R&DEC**) scheme, provided certain conditions are met. The amount of R&D expenditure credit is currently 12% of a large company's "qualifying R&D expenditure" incurred on or after 1 January 2018. If the company is in a tax paying position, the credit will offset some or all of the tax liability; if the company is in a loss-making position, the credit is given by way of a cash refund from HMRC.

The UK patent box allows UK companies an effective 10% rate on profits attributable to "qualifying IP rights" or exclusive licenses of such rights, provided that the company significantly develops those rights, or makes plans or decisions for their development if another company in the same group develops them instead. "Qualifying IP rights" for UK patent box purposes generally includes patents granted under the UK Patents Act 1977, the European Patent Convention or their EEA equivalents.

"Qualifying IP rights" for UK patent box purposes also include marketing authorisations granted under applicable EU law in respect of medicinal products benefitting from certain EU law-derived protections or prohibitions in relation to marketing and clinical data. Because marketing authorizations may only be granted to persons based in the EU, UK companies would no longer be able to obtain marketing authorizations unless a Withdrawal Agreement provides otherwise, even if the company would otherwise be eligible to apply for one. The UK patent box would have no value in these circumstances, so any UK companies who would otherwise be eligible to apply for such marketing authorizations would either need to take appropriate IP advice on the feasibility of applying for UK or EU patents instead, or consider applying for such patents separately in their own right – for example, due to the uniqueness and inventiveness of the medicinal products in question (or components thereof), or of the techniques used to administer them.

- Other tax benefits of IP ownership include the availability of a deduction against taxable profits for accounts-based amortization of IP. Legislation has also recently been introduced to allow relief for the cost of goodwill in certain circumstances.

Impact of Brexit on EU-UK Supply Chains

Unless businesses take the necessary steps to prepare for Brexit in the manner described further below, there is a risk that Brexit could cause significant disruption to movements of goods between UK and EU businesses, mainly due to the fact that the goods will no longer be able to move freely between the UK and the EU without having to pay customs or excise duties or fulfil related administrative requirements. This is a particularly important consideration for multinational groups with UK and EU subsidiaries that supply goods to each other within a supply chain, for example from an EU manufacturer to a UK distributor.

VAT Post-Brexit

In the event of a "no deal" scenario, the Government's aim will be to keep UK VAT procedures as close as possible to what they are now in order to provide continuity and certainty for businesses, although there will be some specific changes to the VAT rules and procedures that apply to transactions between the UK and EU Member States. The current UK VAT rules relating to intra-UK transactions will continue to apply to UK businesses post-Brexit.

The Taxation (Cross Border Trade) Act 2018 amends certain aspects of the UK VAT system to the extent it interacts with the EU. HMRC has published the following key guidance on how certain VAT rules and procedures will work post-Brexit in the event of a "no deal" scenario:

- The Government will introduce postponed accounting for import VAT on goods brought into the UK. This means that VAT-registered businesses importing goods to the UK will be able to account for and recover import VAT on their VAT return instead of paying import VAT upon arrival of the goods at the UK border. This new procedure will apply to imports from both EU and non-EU countries, thus giving UK businesses a significant cash flow advantage. Customs duties may also be payable (see below on "Customs Duties post-Brexit").
- Low Value Consignment Relief for parcels valued at less than GBP 135 will no longer be available for goods entering the UK from overseas, whether from the EU or from outside the EU. This means that all goods entering the UK as parcels sent by overseas businesses will be subject to import VAT, unless they are VAT-exempt or zero-rated under UK domestic rules.
- Distance selling arrangements will no longer apply to UK businesses. Instead, they will be able to zero-rate sales of goods to EU-based non-business customers. Current EU rules mean that EU Member States would have to treat goods entering the EU from the UK in the same way as goods entering from other non-EU countries, with associated local import VAT and customs duties becoming due when the goods arrive into the EU. Each EU Member State will have its own separate rules for import VAT and customs duty. UK businesses will continue to be required to register for VAT in the EU Member States where the customers are based, in order to account for the VAT due in those countries.
- VAT-registered UK businesses will continue to be able to zero-rate exports of goods to EU businesses but will no longer be required to complete EC Sales Lists. Such UK businesses will need to retain evidence to prove that the goods have left the UK in order to support the zero-rating of the supply. Most businesses already maintain this evidence as part of current processes and the required evidence will be

similar to that currently required for exports to non-EU countries.

- The VAT "place of supply" rules for supplies of services will continue to apply in broadly the same way as they do now. (The current "place of supply" rules determine the country in which a business needs to charge and account for VAT). For UK businesses supplying digital services to EU non-business customers, the "place of supply" will continue to be where the customer resides.
- UK businesses that sell digital services to EU-based non-business customers will no longer be able to use the UK's MOSS Union Scheme to report and pay VAT on sales of digital services to consumers in the EU. Businesses that wish to continue using the MOSS system will need to register for the VAT MOSS non-Union scheme in an EU Member State, which can only be done after Brexit day. The VAT MOSS non-Union scheme requires businesses to register by the 10th day of the month following a sale.
- UK businesses will continue to be able to claim refunds of VAT from EU Member States under the 13th Directive procedure, which lays down the minimum requirements for VAT recovery procedures for non-EU businesses that incur VAT on related input costs in EU Member States. This process varies across the EU and businesses will need to make themselves aware of the processes in the individual countries where they incur related input costs and wish to claim a refund.
- UK businesses will be able to continue to use the EU VAT number validation service to check the validity of an EU business customer's or supplier's VAT registration number. HMRC is developing a service so that UK VAT numbers can continue to be validated.

Where an EU-based business customer orders goods from a UK-based intermediate supplier that in turn orders the goods from a non-EU supplier for direct delivery to the customer in fulfilment of that customer's order, the UK intermediate supplier will no longer be able to use the simplified triangulation procedure, meaning that it will need to register for VAT in the EU country where the customer is based. Nor will the simplified procedure be available if the original supplier is based in the UK, since the ultimate origin of the goods will be from outside the EU. (Broadly, a simplified triangulation procedure works by allowing an EU-based intermediate supplier to issue a VAT invoice to the EU customer and record the transaction in an EC Sales List or local equivalent, instead of having to register for VAT in the customer's EU jurisdiction. As part of this simplified procedure, the intermediate supplier must also provide its own VAT number to the original EU-based supplier as proof of zero-rating).

Customs Duties Post-Brexit

From a customs duty perspective, a "no deal" Brexit means that the free circulation of goods between the UK and EU would cease, and import and export duties would become payable upon the making of the appropriate customs declaration. Separate safety and security declarations would also need to be made by the carrier of the goods (this is usually the hauler, airline or shipping line, depending on the mode of transport used to import or export the goods).

HMRC has published the following key guidance on how customs and excise duties will work post-Brexit in the event of a "no deal" scenario:

- Goods traded between the UK and the EU after Brexit day will be subject to the same requirements as third country goods, including the payment of customs duty.

Under WTO rules, the principle of most-favoured-nation (**MFN**) treatment means that, unless a preferential agreement is in place, the same rate of duty, on the same good, must be charged to all WTO members equally.

- Importers of goods into the EU from the UK will need to use the EU MFN rates set out in the CCT. The EU may change these rates between now and Brexit day. The EU may also impose export tariffs for certain products, to which UK businesses will need to respond.
- Importers of goods into the UK from the EU will no longer be able to use EU tariff information published by the EU. Instead, the UK will apply its own MFN rates.

For this purpose, a new system of UK import tariffs is expected to be implemented by secondary legislation pursuant to the Taxation (Cross Border Trade) Act 2018 before Brexit day. In the meantime, current UK tariff rates may be used as an indicator of the likely cost of such MFN tariffs when planning for any financial outcomes or results that need to factor in the anticipated cost of customs duties.

- For movements of excise goods (e.g. tobacco, alcohol and oil/hydrocarbons), the Excise Movement Control System (**EMCS**) would no longer be used to control suspended movements between the EU and the UK.

ECMS would continue to be used to control the movement of duty suspended excise goods within the UK, including movements to and from UK ports, airports and the Channel tunnel. This will mean that businesses moving excise goods within the EU, including those in duty suspension, will have to place those goods into UK excise duty suspension immediately on importation to the UK, otherwise excise duty will become payable.

- UK businesses that import and export goods to and from the EU will need to have a valid Economic Operator Registration and Identification (**EORI**) number, and must register for an EORI number via the EORI registration portal at https://www.gov.uk/eori at the earliest possible opportunity in order to avoid unnecessary delays at the border post-Brexit day.

An EORI number will be required for UK importers of goods from the EU who wish to make use of the Transitional Simplified Procedure (**TSP**), which will be effective for one year from Brexit day to allow businesses enough time to prepare for usual import processes. The TSP will allow importers to defer giving a full declaration until after the goods have crossed the border and to defer paying any duty until the month after import.

At the time of import or export, businesses will need to submit an import or export declaration to HMRC as appropriate, or arrange for their customs broker, freight forwarder or logistics provider to do this for them. For imported goods, UK businesses will need to pay import VAT and import duties, including any excise duty on excise goods, unless the goods are entered into duty suspension within a customs or excise warehouse. (A financial security may be required to cover the duty liability of the goods whilst they are being moved to the warehouses). It may also be necessary to apply for an import or export license or provide supporting documentation in order to be able to import or export specific types of goods into or out of the UK, or to meet the conditions of the relevant customs import or export procedure.

Potential Impact of Customs Duties on the Pharmaceutical Sector

In May 2018, a House of Commons committee held a hearing on the likely impact of a "no deal" scenario on the UK pharmaceutical industry. The report concluded that the UK would be able to trade in certain pharmaceutical products with the EU on a zero-tariff basis under the WTO's Pharmaceutical Tariff Elimination Agreement, which covers a limited range of finished products and ingredients, even though the UK is not a signatory. The EU is a signatory, meaning that the UK would receive the benefit on a MFN basis, although tariffs will apply in trade with other non-signatory countries like China, Russia, and Brazil. Although the Agreement is supposed to be updated every three years, it is estimated that roughly 1,000 products and 700 ingredients remain uncovered by the Agreement and will face tariffs. One pharmaceutical giant has reported that it may have to pay duties in all countries, including the EU, ranging from 4 per cent to 6.5 per cent for active pharmaceutical ingredients and intermediates. It is hoped that some of the larger pharmaceutical giants will be able to use their leverage to negotiate tariff-free trade in an increased range of pharma products.

Contractual Matters

From a contractual perspective, UK businesses will also need to ensure that their contracts and International Terms and Conditions of Service (**INCOTERMS**) reflect the fact that they are an importer or exporter as appropriate. Other contractual changes may also be necessary to take account of a "no deal" Brexit. Should any of these changes affect which party owns the goods at what point of the transaction or otherwise alter the extent to which the parties bear the economic risk in the goods, this could impact any functional analysis of any underlying goods transaction from a transfer pricing perspective if the transaction is made between UK and EU related parties. This would mean that the contract price(s) may no longer reflect the functions performed, assets used and risks assumed by each party to the transaction, thus increasing the risk of a transfer pricing adjustment either by HMRC or the tax authority of the relevant EU jurisdiction as appropriate.

Restructuring Options

UK businesses may wish to consider relocating from the UK to the EU (or vice versa) in order to be based in the same country as their suppliers or customers. Such a move would minimize any potential disruption to supply chains brought about by customs duty requirements. However, the following considerations should be borne in mind before doing so:

- A UK company should still be able to relocate its business to the EU on a tax-free basis, provided the transaction is structured correctly and certain conditions are satisfied.
- If an EU company wishes to relocate its business to a UK company by means of a cross-border merger involving (for example) an asset transfer, a PE transfer or a share for share exchange, it would no longer be able to do so on a tax-free basis since the EU transferor would no longer be bound by the EU Mergers Directive (2009/113/EC) in relation to a UK transferee, thus giving rise to the possibility of exit taxation or other taxes in respect of capital gains imposed on the relevant EU transferor by its jurisdiction of residence. A payment deferral mechanism may, depending on the circumstances, be available in the relevant EU jurisdiction to mitigate any adverse cash flow impact of such taxes, particularly if the

EU transferor's country has implemented ATAD I.

- Changing a company's residence from an EU jurisdiction to the UK would trigger an exit tax for the company by reference to the market value of its assets at the time of the change of residence if the EU country in question has implemented ATAD I (the UK already has a similar rule for a change of company residence in the opposite direction). That said, it should be possible for the EU transferor in these circumstances to defer payment of exit taxes by paying the tax in instalments over a five year period.

Exit taxes aside, there may be sound tax-driven reasons for relocating from the EU to the UK in certain circumstances. For example:

- IP-rich EU businesses may wish to relocate to the UK in order take advantage of the UK's relatively favourable tax environment for IP and related R&D discussed above (see section above on "Operating Companies").
- Moving parts of the supply chain to the UK would reduce the total cost of customs duties and bring them within the UK VAT regime, thus ensuring seamless UK VAT accountability and recoverability at the various stages of the supply chain without the need to go through a potentially cumbersome 13th Directive VAT refund process to recover input VAT incurred in an EU Member State.

That said, if a significant portion of the business's end-consumer base is in the EU, the business would still have to supply goods from the UK to EU-based non-business end-consumers and register for VAT in all EU Member States where those end-consumers are based. There will also be customs duty implications at this final end-consumer stage of the supply chain.

EMPLOYMENT LAW

In headline, in either a deal or "no deal" scenario, there is little if any change expected in relation to UK employment laws in the short term.

The Secretary of State with responsibility for employment law told Parliament on 7 November 2016 that the Government would "entrench all existing workers' rights in British law, whatever future relationship the UK has with the EU" and "[i]t is a helpful feature of this debate that we are able to say, clearly and unambiguously, that all the rights derived from membership of the EU will be imported into UK law". And since that time, the Prime Minister has reiterated on numerous occasions that this Government "will not only protect workers' rights, but enhance them".

Indeed, the Government has issued a series of technical notices which confirms that, in the event of a "no deal" Brexit, workers in the UK will continue to enjoy the rights they are currently entitled to under EU law with one key exception (relating to European Works Councils – discussed further below). To achieve this, the EU(W)A provides for EU law (with necessary technical drafting amendments) to be imported into UK law on exit.

If a deal on Brexit is achieved, the EU(W)A would be amended to put its effect on hold until the end of the transition period. The draft Withdrawal Agreement that has been under consideration since late 2018 provides that EU law will continue to apply during a transition period through to at least December 31 2020. Employment law rights derived from EU law (such as anti-discrimination rights, collective consultation obligations, TUPE regulations, family leave and working time rights) would therefore be maintained for this period as a minimum.

It is highly likely that employment rights would be maintained after the transition period too, not least because The Political Declaration setting out the Framework for the Future Relationship between the EU and UK (which accompanied the draft Withdrawal Agreement) includes a commitment to work together to safeguard "high standards of … workers' rights" and a statement that the future relationship must ensure open and fair competition, including provisions on social and employment standards.

Therefore, whether there is a deal or not, UK employment laws are unlikely to change in the short term.

European Works Council

The only substantive changes relate to European Works Councils (**EWC**s), which cannot continue to function as they do currently in the event of Brexit.

The draft regulations which accompany the EU(W)A provide that no new requests to set up an EWC or information and consultation procedure can be made after Brexit.

For existing EWCs, the impact of Brexit will depend on the terms of the EWC. For EWCs which are not governed by UK law, the default position is that UK employees will no longer be entitled to have representatives on the EWCs, and the UK delegates' seats will need to be reallocated, unless the parties to the EWC agreement agree otherwise.

Those governed by UK law will need to designate another EU country to govern the EWC. The choice of which alternative law will apply should be carefully considered in light of the fact that it will have strategic implications for the composition of the EWC and national legal concepts to which it will be subject.

Changes to Employment Laws in the Future?

In theory, Parliament could make future legislative changes to employment law, but these are likely to be limited given the commitments given by the Government and, in the event of a no deal Brexit, the practicalities of negotiating any future trade arrangements with the EU.

Nevertheless, there are a number of areas that have been identified by employer associations and business groups as imposing unnecessary burdens on business and which could be reviewed in the future, in particular the Working Time Regulations 1998, the Agency Workers Regulations 2010 and the limitation imposed by TUPE 2006 on the ability of employers to harmonise terms and conditions of employment following a relevant transfer to which TUPE applies.

In terms of case law, under the EU(W)A, in theory at least, the Supreme Court could re-examine and potentially overturn doctrines derived from European case law. Much-litigated issues such as holiday pay could, therefore, theoretically at least, be re-opened. However, again, in light of the reassurances given about the continued protection of employment rights, any significant roll-back would be surprising.

Immigration

Immigration is an area that has the ability to have significant impact on some employees and their families.

If the UK leaves the EU with a deal, it has been agreed that there will be an "implementation period" from Brexit to December 31 2020. During the implementation period, free movement will effectively continue between the UK and the EU.

The British Government has promised that, whether or not there is a Brexit deal, under the "EU Settlement Scheme" all EEA nationals and their families living and working in the UK as at 29 March 2019 will have the continued right to reside and work in the UK and to acquire rights of permanent residence in the UK after five years of qualifying residence.

The scheme comes into full effect on 29 March 2019. The Government has stated that applications for Settled or Pre-Settled Status must be made before the end of June 2021 if there is a Brexit deal (or 31 December 2020 in the event of a "no deal" Brexit), to protect an individual's rights to remain in the UK.

Practical Steps for Employers

The key impact will be for employers who recruit or second employees cross-border. Employers with affected employees will wish to ensure that they are familiar with the "Settled Status" procedure and the relevant deadlines.

Employment Taxes: Social Security

EU regulations currently help internationally mobile employees pay social security contributions in only one Member State. In the event of a "no deal" Brexit, these regulations will cease to have effect in the UK. Although the UK has legislated for the status quo to continue, whether it will do so will depend entirely on reciprocal action by the EU, which has not been agreed. The UK had a limited number of agreements with some, but not all, of the EU Member States before the regulations took effect; however, these are far less comprehensive than the EU regulations, and may be limited in duration and scope.

Employers will therefore need to review the social security status of employees moving into or out of the EU, and will also need to review all international working arrangements to determine whether new social security obligations are triggered.

HEALTH CARE

The Department of Health and Social Care has provided guidance to the health sector about steps that need to be taken to deal with "no deal" (EU Exit Operational Readiness Guidance) (**DH Guidance**). The guidance is largely written for NHS providers but also applies to independent sector providers and GPs. Under this guidance, all providers are advised to continue with their business continuity planning, taking into account national guidance and including local risk assessments.

Workforce

Providers of health and care services are heavily dependent on EU workforce. According to NHS Digital, estimates are that nearly 62,000 (5.2 per cent) of the English NHS's 1.2 million workforce and an estimated 104,000 (around 8 per cent) of the 1.3 million workers in England's adult social care sector have come from EU countries.

This significant EU dependency coupled with significant workforce shortages across key skilled areas in health care and increasing early retirement by senior clinicians who have been affected by changes in pensions' cap means there is a heady confluence of risk factors around Brexit.

Mutual Recognition

Currently, there is mutual recognition of professional qualifications of health care staff under EU regulations – this is a crucial element in the context of the dependency of the UK health and care sector on EU health and care workers.

The DH Guidance makes it clear that health and care professionals whose qualification has been recognised and who are registered in the UK will continue to be registered after this point. Similarly, health and care professionals, who apply to have their qualification recognised in the UK will have their application concluded under current arrangements. However, a crucial question remains about mutual recognition after Brexit. The DH Guidance is unclear on this and simply states that this "will be subject to future arrangements".

Right to Remain

Under the EU Settlement Scheme, EU citizens will be able to register for settled status in the UK if they have been here for five years, or pre-settled status if they have been here for less than five years. This will ensure the rights of EU citizens are protected in the UK after EU Exit, and guarantee their status and right to work.

At this stage, the future immigration rights of new health and care workers under a "no deal" Brexit is unclear. (*See employment section for further details)*

Steps to Take

Health care business should identify staff who are EU citizens and publicise the EU Settlement Scheme, noting that following the Prime Minister's announcement in January 2019, there is no fee to apply for settled or pre-settled status.

Supply of Medical Devices to the United Kingdom

Every day health care businesses in the UK rely on EU manufacturers and suppliers of a vast number of medical devices and consumables; much of this is delivered on "just in time" delivery systems.

Currently, these medical devices are subject to EU and UK devices regulation and are not subject to tariffs. If there's no deal, the UK's participation in the European regulatory network would cease – this regulatory regime includes a mutuality of medical devices approved in EU Members states.

The MHRA has stated that for a time limited period the UK will continue to recognise medical devices approved for the EU market and CE-marked. The UK has published the design for its replacement for the CE mark, namely "CA UK". This will be the UK CE mark equivalent indicating compliance with the UK's post-Brexit legislation. That legislation may mirror the MDR and the IVDR, or the UK may take a different approach. The MHRA has said that it will be holding a consultation on the future process for placing a medical device on the UK market and that adequate time will be provided for businesses to implement any new requirements.

However, if there is disruption to shipping or transit routes, this may mean significant disruption or cancellation of health care services. The Department of Health and Social Care and national NHS bodies have stated that they have increased levels of stock holding in the national procurement and logistics operation, have requested certain suppliers that to increase stocks, where possible and have access to government shipment channels.

It is not clear whether the central government planning only covers providers of NHS health care services.

Steps to Take

- Independent health care providers should review their supply chain and confirm that suppliers have sufficient capacity and have increased supplies in the event of a "no deal" Brexit. Independent health care providers may wish to consider ensuring that additional stocks are held of medical devices where suppliers are unable to confirm that supply routes will be undisrupted.

- NHS providers should follow the DH Guidance
- Suppliers of Medical devices to the UK should consider whether they need to place surplus product on the UK market. While the UK will recognise an existing CE Mark post-Brexit, that recognition is time limited, and there may be "no deal" prompted customs, importation, production and logistics issues to consider.

Supply of Medical Devices from the United Kingdom

If there's a "no deal" Brexit, UK Notified Bodies will no longer by recognised by the EU. This means that if a medical device has been recognised by a UK Notified Body, the certification will no longer be in conformity with the applicable EU Directive and cannot be the basis for placing on the market in the EU.

Steps to Take

- Where suppliers of medical devices have only a UK Notified Body, its CE certifications will expire. New certificates will need to be obtained from an EU Notified Body. Some UK Notified Bodies have EU counterparts, which may offer options to recertify. Appointing an EU-based Notified Body should already be underway for there to be any chance for re-certification to be achieved prior March 29 2019.
- Any UK (or other non-EU) company placing medical devices on the EU market will need to have an Authorised Representative in the EU.
- While the UK will recognise an existing CE Mark form a UK or EU Notified Body post-Brexit, there is no certainty that in a "no deal" scenario the EU will recognise CE marks of UK Notified Bodies. There has been some conjecture around emergency supplies and essential devices, but there is no certainty.
- Suppliers of Medical devices to the EU should consider whether they need to place surplus product on the EU market prior to March 29 2019 given that "no deal" is likely to invalidate any UK Notified Body CE marking certificate.
- There may be "no deal" prompted customs, importation, production and logistics issues to consider.
- Medical Devices imported from the UK post-Brexit but already bearing pre-Brexit labelling will need to be re-labelled as to Notified Body and Authorised Representative identification.

Supply of Medicines to the United Kingdom

According to the Royal Pharmaceutical Society, the UK imports 37 million packs of medicine each month from the EU and exports even more.

EU directives regulate the supply and authorisation of medicines across Europe. The MHRA has stated that most medicines on the UK market already have a UK Marketing Authorisation (**UKMA**), which will be unaffected by exit from the EU.

However, a large proportion of drugs approved in the last decade (such as biotech and cell therapy treatments, and all drugs for the treatment of AIDS, cancer, neurodegenerative disorders or diabetes) have been approved via the "Centralized Procedure". This results in a single EU Marketing Approval (**EUMA**), permitting the sale of that product across the entirety of the EU.

The MHRA has stated that post-Brexit, EUMAs will be "converted", so far as the UK market is concerned, into UKMAs. This "grandfathering" process will happen automatically and be instigated by the MHRA.

Both the EU and the UK require certain named entities to be in existence with respect to medicinal products:

- A Qualified Person (**QP**). Before drugs can be placed on the market, their compliance with quality standards for release into the market must be legally certified by a QP, at his or her personal responsibility. A QP is an experienced individual, typically a licensed pharmacist, biologist or chemist, with experience working in pharmaceutical manufacturing operations who is suitably qualified to assess that quality compliance.
- A Qualified Person for Pharmacovigilance (**QPPV**) is an appropriately qualified person who is personally responsible for the safety of the medicinal products marketed by a MA Holder. The QPPV shall be "permanently and continuously at the MA Holder's disposal responsible for pharmacovigilance", being the assessment, monitoring, and prevention of adverse events.
- An "Authorised Representative" who can be contacted in the event of a safety issue with a medicinal product.

QP: For product manufactured in the UK and placed on the UK market, or directly imported into the UK from a country not on a designated country list (whitelist), the QP must reside and operate in the UK. For products manufactured in a country on a whitelist or manufactured in a third country and imported into the UK from a country on a whitelist, the QP can reside in a country on the whitelist.

QPPV: For product placed on the UK market, while the QPPV should be established in the UK on day one, MA Holders without a current UK presence will have until the end of 2020 to do so. In the meantime, MA Holders are required to make arrangements for providing the MHRA with access to the relevant safety data related to UKMAs. An MA Holder's EU QPPV may take on responsibility for UKMAs until a UK QPPV is appointed.

Authorised Representatives: For medicinal product placed on the UK market, where the MA Holder is not yet established in the UK, the Authorised Person must be in the UK.

Steps to Take

- Independent health care providers should review their supply chain and confirm that suppliers have sufficient capacity and have increased supplies in the event of a "no deal" Brexit. Independent health care providers may wish to consider ensuring that additional stocks are held of medical devices where suppliers are unable to confirm that supply routes will be undisrupted.
- There appears no advantage in EU-based MA Holders placing surplus medicines on the UK market, at least not for regulatory purposes.
- MA Holders will be required to provide the MHRA with "baseline data" (which the MHRA has not yet specified) for its newly converted UKMAs (as the UK will no longer be part of the EU regulatory network and so will not have access to such data as applicable to the corresponding EUMA).

- Prepare for the need for UK based QP, QPPV and Authorised Representatives.
- There may be "no deal" prompted customs, importation, production and logistics issues to consider.

Supply of Medicines from the United Kingdom

Regarding MAs, the position is different for an EUMA Holder based in the UK placing product on the EU market. The EUMA must be held by an entity established in the EU. First, the EUMA will need to be transferred from the UK MA Holder to an EU based entity.

QP: For product manufactured in the UK and to be placed on the EU market, the QP must reside and operate in the EU.

QPPV: For product placed on the EU market, QPPV must be established in the EU.

Authorised Representatives: For medicinal product placed on the EU market, where the MA Holder is not yet established in the EU, the Authorised Person must be in the EU.

Steps to Take

- Transfer UK held EUMAs to an EU entity.
- UK-based entities holding current EUMAs but only having a UK based QP should consider whether they need to place surplus product on the EU market prior to March 29 2019.
- MA Holders with QPs and QPPVs currently residing only in the UK will either need to relocate them to the EU, or find replacement or additional individuals to reside and operate in the EU.
- There may be "no deal" prompted customs, importation, production and logistics issues to consider.

Supply of Tissues and Cells to and from the United Kingdom

UK law already implements the EU Organ Directives and EU Tissues and Cells Directives, meaning safety standards for the movement of tissues and cells will not change on exit or in the event of a "no deal" Brexit. The UK will however become a third country under arrangements with other EEA countries.

Steps to Take

- UK licensed establishments that import or export tissues or cells from EEA establishments (such as hospitals, stem cell laboratories, tissue banks and fertility clinics) will need to ensure that appropriate written agreements (also referred to as "third party agreements") are in place to continue importing or exporting these products.
- Third party agreements are required where a person or establishment is supplying to a licence holder any goods or services which may affect the quality or safety of the tissues or cells. This means companies supplying equipment and materials for clinics and laboratories as well as courier companies transporting tissues and cells are included and require third party agreement in place.
- UK licenced establishments that already hold agreements with other third countries can use this as a template for EEA agreements.

UK JUDGMENTS IN CIVIL AND COMMERCIAL MATTERS

The Law Society of England and Wales has recently released its guidance *on No Deal Brexit and Cooperation in Civil and Commercial Matters*. It makes for alarming reading.

The Current Position

Brussels I

Currently, as a member of the European Union, the UK enjoys the advantages of the Brussels 1 Regulation which provides a simple mechanism for determining which jurisdiction's courts shall have jurisdiction over any particular dispute. The parties are free in contractual matters to agree which court shall have jurisdiction. Typically, in the absence of agreement, the defendant shall be sued in the jurisdiction of their domicile. There are special provisions in respect of claims by some weaker parties permitting them to sue in the jurisdiction of their own domicile. Additionally, the judgments of the court (whether they are for monetary or non-monetary relief) are then easily enforced across the EU as easily as domestic judgments of the court in which enforcement is made.

Additionally, through its membership in the European Union, the UK is a signatory to the Lugano Convention and the Hague Convention.

Lugano Convention

Under the Lugano Convention (agreed in 1988), the EU and EFTA states agreed certain matters in respect of the recognition and enforcement of one another judgments. Brussels I has advantages over the Lugano Convention; the most often cited advantage being that under Brussels I a court selected by the parties is entitled to proceed even if proceedings were previously commenced in another Member State whilst under the Lugano Convention the court first seized of the matter must first rule on the matter before the second court can proceed (the "Italian Torpedo"). The Lugano Convention is an agreement and any new matter wishing to join the Convention may do but only with the ratification or agreement of all of the other parties, currently the EU itself and the EFTA states.

The Hague Convention

The 2005 Hague Choice of Courts Agreements Convention provides that signatories agree that their courts will enforce the judgment of another member's courts where the parties have agreed an exclusive jurisdiction clause. Significantly, the Hague Convention only applies to contracts entered into after both jurisdictions are signatories.

March 29 2019

On March 29 2019, as things currently stand the UK will leave the European Union without a deal.

The Law Society and the European Commission have indicated that the result is that the UK will cease to be able to rely on the Brussels Regulation, the Lugano Convention and the Hague Convention. Whilst the UK has signalled its intention to re-join Lugano this will require the agreement of the EU and the EFTA states. The UK has indicated that it will sign up to the Hague Convention effective April 1 2019 but this will likely only apply to contracts entered into after that date.

It may be that there are pre-EU agreements between any given Member State and the UK. These may as a matter of the law of the individual Member State revive after Brexit. However, whether this is the case is currently only a matter of argument and conjecture and is moreover a matter for the courts of the remaining EU Member State.

The European Commission has indicated that no UK judgments will be enforceable after March 29 2019 (as things currently stand) unless exequatur proceedings have been commenced to enforce the judgments in a remaining EU country before March 29 2019.

Whether the courts of any EU Member State will enforce any UK judgments as a matter of its domestic law after 29 March 2019 is a matter for lawyers in that individual Member State; however many EU Member States do not enforce judgments of third countries.

This means that any current UK proceedings which are not concluded and in respect of which exequatur proceedings have not been commenced by March 29 2019 may not be enforceable in the relevant EU jurisdiction. It also means that any contracts which anticipate enforcement of a UK judgment in Europe after Brexit may not be enforceable either.

Conversely, the court of England and Wales do not enforce non-money judgments from a foreign court and so judgments for declaratory or injunctive relief from an EU court will also ultimately not be enforceable in the UK (unless they are covered by the Hague Convention or perhaps the Lugano Convention is agreed).

Current Solutions

Currently, the best solution in commercial contracts is likely to use arbitration clauses rather than court jurisdiction clauses in most instances involving UK and foreign parties. However, if arbitration is not feasible (for example, one party may need to rely on the threat of possible default judgment or one party not be capable of entering into an arbitration agreement) then one should very heavily consider agreeing to the jurisdiction of a foreign court. If a foreign court is agreed, one should seriously consider bilingual contracts to prevent ambiguities in translation only being discovered during enforcement proceedings. Parties to international contracts involving Europe, Mexico or Singapore with contracts that contain exclusive jurisdiction clauses appointing the English courts should ratify or more likely re-negotiate all such agreements after 1 April 2019 so that such jurisdiction clauses may be enforceable under the Hague Convention.

DATA PROTECTION

In this section, we consider the key impact of a "no deal" Brexit on companies that process personal data. The General Data Protection Regulation, which was introduced in May 2018, has direct applicability in each Member State and also has extra-territorial application, in certain circumstances to companies outside of the EEA. In addition, each Member State has introduced supplemental national law, which for the UK is the Data Protection Act 2018.

The UK Position

Until the UK withdraws from the EU, and for the period of the presently proposed transitional arrangements it is expected that the Data Protection Act 2018 (**DPA 2018**) and the General Data Protection Regulation (**GDPR**) will continue to apply.

At the end of the transitional arrangements, or in the event of a "no deal" Brexit on March 29 2019, the GDPR will no longer be part of domestic UK law. Instead, the EU(W)A, the DPA 2018 and further implementing legislation such as the Data Protection, Privacy and Electronic Communications (Amendments etc) (EU Exit) Regulations 2019 will incorporate into UK law a version of the GDPR called the "UK GDPR". The UK GDPR is very similar to the GDPR, and so this means that the compliance programs and data protection frameworks that are already in place will continue to be useful.

However, the extra-territorial application of the GDPR means that upon Brexit certain UK companies will, in addition, continue to be subject to the GDPR where they are processing personal data in connection with offering goods or services to individuals within the EU or monitoring their behaviour.

The primary effect of this will be that many international companies with operations in the UK will need to simultaneously comply with the UK GDPR and the GDPR and so will need to be mindful of regulatory developments on both sides of the channel, particularly if over time there begins to be a divergence between the UK GDPR and the GDPR.

The EU Position

For most companies on the continent, it will be business as usual, as the GDPR will continue to apply to their operations. However, the UK government has indicated that it intends to retain the extraterritoriality of the UK's data protection framework; such that the UK GDPR will apply to companies who are based outside of the UK where they are processing personal data about individuals in the UK in connection with offering them goods and services, or monitoring their behaviour. As a result, various EU-UK focused companies will also be subject to both the GDPR and the UK GDPR.

Legal Framework for Cross-Border Transfers

Perhaps the most significant effect of the UK's withdrawal from the EU, will be the impact on EEA-UK data flows.

The UK Position

Notably, the UK government has confirmed that the UK would at the point of exit continue to allow the free flow of personal data from the UK to the EEA. This is because the government will transitionally recognize all EEA countries and Gibraltar as "adequate". In addition, where the EU has made an adequacy decision in respect of a country or territory outside of the EU prior to exit day, the UK government intends to preserve the effect of these decisions on a transitional basis. This means that for UK-EU transfers and transfers to non-EU adequate countries, no additional safeguards or measures will need to be implemented as these transfers are considered to be in compliance with the UK GDPR.

Further, in the draft Data Protection, Privacy and Electronic Communications (Amendments etc) (EU Exit) (No. 2) Regulation 2019 the UK government intends to recognise the US Privacy Shield self-certification as adequate for the transfer of personal data to the US, provided some small alterations are made to the Privacy Shield certification.

However, the legal framework governing transfers of personal data from organizations (or subsidiaries) established in the EU to organizations established in the UK would change on exit. As set out below, certain steps will need to be taken in order to maintain the free-flow of personal data from EU entities to UK entities.

The EU Position

In a "no deal" scenario, the way in which EEA countries can transfer personal data to the UK will become purely a matter of EU law (over which the UK will cease to have any influence). In particular, an established mechanism exists to allow the free flow of personal data to countries outside the EEA where they are deemed adequate by the EU Commission. However, despite the UK's compliance with the GDPR and introduction of the UK GDPR, it is extremely unlikely that a UK adequacy decision will be made by the EU Commission before 29 March 2019 and it is not guaranteed to take place before the end of any transition period, if agreed.

As at the time of writing, the UK government has indicated to its EU counterparts that it is ready to begin preliminary discussions on an adequacy assessment now; however, the EU Commission has suggested that the adequacy procedure will not start until the UK becomes a third country (i.e. only when the UK has withdrawn from the EU). While we expect this timeline to slip, the EU has indicated that it will endeavour to adopt an adequacy decision in relation to the UK by the end of 2020.

Steps to Take

We have identified the three key areas of focus for your company as we move towards Brexit.

International Transfers

In the absence of an adequacy decision, the most immediate action that must be taken by companies with EU-UK data flows is the implementation of a transfer mechanism. In the short term, the most effective solution will likely be to implement the EU Commission approved standard contract clauses ("SCCs") with any UK data controllers or processors with whom data will be shared; or for UK companies for their own data exports outside of the EEA. Note, however the following observations on how the SCCs may not be fit for purpose:

- the SCCs do not fit perfectly to every situation. They assume the data exporter is always a controller, and so there is no standard contract for the situation where the controller is based in the UK and the processor is based in the EEA;
- care should be taken where the SCC is between a company and its branch, as each party will not be a distinct legal entity and a contract may not be validly formed;
- the SCCs were written prior to the introduction of the GDPR and have not yet been updated by the European Commission to be compliant; this means that any SCCs that are put in place may need to be re-executed once updated versions are available; and
- the SCCs are currently under attack in the courts in a case brought by Mr. Max Schrems and may be held by the ECJ to be invalid. This will put companies relying upon SCC immediately in breach of the GDPR until revised, compliant, SCCs are executed or other data transfer methods are put in place.

If SCCs are not suitable, or not suitable as a long term solution then alterative compliance methodologies, such as Binding Corporate Rules should be considered.

Dual application of GDPR and DPA 2018

The dual application of data protection standards should be carefully monitored, such that regulatory developments and guidance papers must be closely followed for both regimes. While the UK regulator has historically been known to take a fairly pragmatic and relaxed approach (compared to its French or German counterparts); the ICO is beginning to take a more stringent / conservative approach in a bid to demonstrate the UK's "adequacy". For companies with operations in EU markets and the UK, consider implementing a small taskforce or working group to ensure that any developments and regulatory decisions relevant to your business are carefully monitored on both sides of the Channel.

Care should also be taken on any cyber security incident. There could now be two regimes to follow when reporting to regulators and dealing with any follow on third party claims.

EU-UK Representatives

Where a company is caught by the extra-territorial application of the GDPR, it is required to designate a representative within the EEA. The UK government has confirmed that it intends to replicate this provision to require companies based outside of the UK to appoint a representative in the UK . This means that UK companies (with no establishments in the EU) will need to appoint an EU representative; and vice versa for EU companies. If your business has no operations within either the EU or the UK, but is subject to the extra-territorial application of the GDPR or DPA 2018, a representative will need to be appointed. Care should be taken over that appointment of a representative. In theory, they are liable for the failures of the company that has appointed them and so many companies are not offering to provide European Representative services.

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