ROPES & GRAY

IMPLICATIONS OF THE UK'S BREXIT REFERENDUM

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As autumn approaches and preparation for the next round of Brexit discussions begins, this note summarises the current position and analysis following the UK's vote to leave the EU on the 23rd June (the "Referendum"). Whilst the debate on the implications of Brexit, including the proposed shape and form the UK's new relationship with the EU is constantly evolving, it is clear that firms operating within the UK and the EU need to continue to do business throughout. Consequently, this note highlights steps that firms may wish to take during this interim period between now and the UK's actual exit from the EU.

"KEEP CALM AND CARRY ON"

From a legal perspective, nothing has changed following the Referendum. The UK remains a member of the EU and applicable EU law remains in force. Although the outcome of the Referendum is not legally binding on the UK government[1] (it is merely advisory), it appears highly unlikely that the UK Parliament will ignore the decision of the electorate. Consequently, this note sets out some of the potential legal implications which may affect your business upon Brexit[2].

There were various immediate economic consequences following the Referendum, including an initial fall in sterling and a decline in the stock market, but the UK economy has already shown signs of resilience following the immediate days after the Referendum. The UK government confirmed that it will relinquish its six month rotational presidency role of the European Council in 2017 with the President of the European Council (Donald Tusk) confirming that Estonia will take over this role.

In addition, Lord Hill resigned as the UK's EU commissioner in the wake of the Referendum, and his role overseeing financial services regulation has been reassigned to Valdis Dombrovskis from Latvia. Consequently, although the UK remains a member of the EU until Brexit and maintains its position as having one of the largest GDPs in the EU, it is inevitable that the UK's influence in current EU negotiations may diminish in the interim period prior to Brexit. Conversely, given that substantial pieces of financial services legislation (often based on UK principles of operation or UK legislation) have already been drafted and approved by the EU, the effective influence of the UK should continue within the EU financial services.

Despite the above, currently, it is "business as usual" in relation to day to day operations within the UK and the EU. However, businesses should monitor and track developments as the discussions and negotiations between the UK and the EU unfold and ensure amendments are implemented in future business plans. Firms may consider how to streamline

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1 The European Referendum Act 2015 made provision for holding the Referendum, but did not make the vote legally binding on the government.

2 In this note, the term **"Brexit"** shall mean the point at which the UK leaves the EU.

their operations on a cross-border basis but also identify and take advantage of opportunities from the potential effects of the current market dislocation within the UK and EU.

EXIT PROCEDURE AND NEGOTIATION PROCESS

Formal Exit Procedure

Article 50 of the Treaty on European Union ("TEU") sets out the procedure for a member state to withdraw from the EU. Article 50 states that a decision to leave should be made in accordance with a member state's constitutional requirements. Once the UK notifies the European Council of its intention to withdraw under Article 50, the UK will remain a member of the EU until the earlier of: (a) the date on which an agreement to withdraw from the EU is finalised; or (b) the expiry of a two year period from the date of notification (unless there is unanimous approval for an extension from the other 27 EU member states). Under Article 50 the exiting member state cannot participate in discussions of the European Council regarding its exit.

The general view amongst commentators is that the withdrawal notice is irrevocable, as Article 50 does not provide for a revocation of the withdrawal notice, and therefore the trigger of Article 50 should not be used to renegotiate a member state's position within the EU. (However, we do note that recent expert analysis[3], commissioned by the House of Lords, indicated that the decision to leave the EU can be reversed after an Article 50 notice had been delivered provided that this was prior to the withdrawal date.) Once the withdrawal agreement has taken effect, the decision to leave the EU is final. If the UK wishes to rejoin, it will need unanimous approval of all EU member states. Alternative options to implement the exit of the UK from the EU, such as treaty amendment under Article 48 TEU or repealing the European Communities Act 1972, have been put forward. These options are undeveloped and potentially more complicated. Furthermore, the European Council has made it clear that withdrawal should occur in accordance with the procedure set out in Article 50 and it seems unlikely that the UK will take an alternative route.

The withdrawal agreement requires approval by a qualified majority of the EU Council (being 72% of the member states representing at least 65% of the total EU population (excluding the UK)), which means that a single member state cannot block the vote. At this stage the shape and form of the withdrawal agreement (or agreements) is unclear, but will include technical details regarding allocation of surplus budgets, and other transitional issues. Decisions regarding the fundamental nature in which the UK and the EU work together going forward will be made, including agreeing on the future of the four EU freedoms and whether these will be upheld in any way. Questions will need to be answered as to whether there will be an agreement to maintain key principles such as the freedom of movement of people or the freedoms to provide goods or services across the EU if the UK were to leave the EU.

Trade Relationships

The UK currently trades with approximately 50 non-EU countries on the basis of preferential trade deals negotiated by the EU. As the UK will likely no longer benefit from these trade agreements following Brexit, it has started informal discussions for its own deals. Other trade relationships with around 100 countries are governed by World Trade Organisation ("WTO") rules, which is the default position in absence of any other agreement. It would benefit the UK to negotiate more bespoke deals with these other countries. Technically under current EU rules, member states cannot enter into separate trade deals with either individual member states or third countries, therefore formal trade agreements can only be signed once the UK has left the EU. The government has three key members of the cabinet dealing with trade negotiations: the Brexit secretary (David Davis); the foreign secretary (Boris Johnson); and the international trade minister (Dr Liam Fox). The European Commission ("EC") has appointed Michel Barnier, who was involved in Europe's post-financial crisis, as its chief negotiator over the Brexit terms.

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[3] Sir David Edward KCMG, QC, PC, FRSE, a former Judge of the Court of Justice of the European Union and Professor of Law, University of Edinburgh; and Professor Derrick Wyatt QC, Professor of Law, Oxford University, and also of Brick Court Chambers.

ISSUES UNDER DEBATE…

Whilst the UK government has given every indication that it will implement Brexit there are a few issues under debate, which require resolution, in relation to the formal notification of Article 50 (including if and when the trigger will be invoked by the UK government).

Constitutional Issues

The UK government has not yet taken any steps to formalise the exit of the UK from the EU. While Theresa May, the new UK prime minister, has said "Brexit means Brexit", there has been much debate as to whether formal withdrawal from the EU under Article 50 requires parliamentary approval to be constitutionally valid. Government lawyers have stated that withdrawal under Article 50 does not require an approval by the UK Parliament, but there are several pending legal challenges as to whether the Article 50 notice can be served by the government (acting through the prime minister) based solely on the exercise of royal prerogative. Some academics have argued that since the Parliament introduced EU law into UK domestic law, only the Parliament can trigger the steps to remove it. Others argue that the withdrawal decision falls under the government's inherent prerogative powers to conduct foreign affairs. The use of prerogative powers to invoke Article 50 could be challenged as ultra vires if the authorisation of Parliament is not sought. We note that the UK Prime Minister and her cabinet have indicated they do not intend to seek prior parliamentary approval or require a general election prior to triggering Article 50.

Timing

The UK government has indicated that it will only invoke Article 50 after further domestic consideration and analysis has been undertaken in relation to the exit process, and that it is unlikely to occur before the end of 2016. Commentators have discussed that the timing of the submission of the formal notice under Article 50 may also be influenced by general elections in Germany and France in 2017. Despite the lack of a formal 'trigger', the UK government has begun its efforts to engage with leaders of EU members states informally, though it should be noted that key EU leaders and Members of European Parliament ("MEPs") have stated that minimal negotiations (or decision making) may occur prior to the UK serving the Article 50 notice and commencing formal discussions. Aside from discussions at the government level, there are further informal discussions between UK institutions and their counterparts in other EU jurisdictions (including at a regulator to regulator level), primarily with the aim of ensuring a smooth continuance of business now and preparing for an effective transition of relevant legal entity permissions if and when this may become necessary.

POTENTIAL MODELS FOR THE FUTURE RELATIONSHIP OF THE UK WITH THE EU

The European single market guarantees the "four freedoms" in the EU-free movement of goods, persons, capital and services. The UK may seek to maintain certain aspects of these arrangements with the EU, while negotiating to remove less advantageous aspects. The UK's continued access to the EU single market following Brexit appears, to a certain extent, to depend on the continuation of all four freedoms.

There are a number of more "established" options available to the UK on exit from the EU including:

- **Membership of the European Economic Area ("EEA")**[4] and **European Free Trade Association** ("EFTA") (such as Norway). This allows access to the EU's internal market without a vote on policy or law-making and requires a financial contribution to the EU budget (the "Norwegian Model"). To become a member of the EEA, the UK would need to re-join the EFTA[5] to enable it to benefit from the economic co-operation, free movement of goods between the EFTA states (Iceland, Liechtenstein, Norway and Switzerland) and also possibly access the EFTA's existing free trade agreements with over 35 countries;

[4] EEA membership is available to member states of the EU and EFTA.

[5] The UK historically was a member before leaving to join what is now the EU.

- **Customs union** (such as Turkey). This allows limited access to the single market for goods, but not services;
- **Bilateral arrangements with the EU** (such as Switzerland). This provides access in part to the EU single market and requires a financial contribution to the EU budget. Negotiations with Switzerland were lengthy and resulted in over 200 trade agreements;
- **Free trade agreement** (such as Canada). This would be a more bespoke option with a trade agreement between the UK and the EU bloc, but could take time;
- **Continuing membership of World Trade Organisation** ("WTO"). This would rely on general international trading rules, which would be the default model if no other agreement was reached between the EU and the UK; or
- **Renegotiation of the EEA Agreement.** An alternative approach has been suggested where the UK could re-join the EFTA and then attempt to renegotiate the EEA Agreement with the EU as a bloc with the other EFTA member states.

However, there is also the possibility that the UK will aim to craft a "UK specific" agreement which may be an amalgamation of elements of the options stated above. Again, it is hard to predict which approach the government is likely to take at this stage.

WHAT DOES BREXIT MEAN FOR THE CITY OF LONDON?

Much has been written about the effects of Brexit and how it could impact London's position as the EU's principal financial centre if the UK loses its access to the EU single market and associated "passporting" rights. The use of the EU passport allows a firm to establish in one EU jurisdiction and obtain a passport to provide services in another EU jurisdiction. This can be achieved either on a cross-border basis or through establishing a branch. The use of passporting is discussed in more detail below in the "Regulatory" section, as well as in our separate client briefing on passporting, available here.

However, it should be noted that financial services are a major part of the UK economy (around 10% of UK's gross domestic product) and London's established capital markets account for about three quarters of European capital market business. These factors, along with the sophisticated legal regime, language advantages and the geographical appeal of London have made the City attractive as headquarters for European financial activity and business. The City is home to key personnel, with a wealth of specialist expertise, who may be reluctant to leave London. Consequently, despite that announcement of certain banks that the possible loss or partial loss of the EU passport may result in a downsizing of their London operations and trigger a move of certain functions to other EU countries or even the United States, we are of the view that London will continue to have much to offer within the global financial services industry. We also note that differing financial services entities and sectors will approach Brexit differently, with some industries such as the asset management industry recognising that in many instances they already have operations set up in both the UK and Continental Europe, diluting the potential effect of Brexit on existing operations.

London's appeal to international litigants should remain untarnished following Brexit. The popularity of the English courts as a forum of choice in international transactions should continue due to their efficiency, accessibility and record of impartiality. English contract law is largely unaffected by Brexit and is likely to retain its prevalence as the governing law for international contracts, as its relative predictability (due to precedent case law), commerciality and familiarity will remain attractive.

KEY CONSIDERATIONS

Whilst it is still too early to provide a definitive legal analysis of the effect of Brexit, firms should begin their analysis on the potential impact of Brexit on their business. The remainder of this note provides more detail in relation to some of the key areas that may affect businesses and sets out some issues that will need to be monitored as the Brexit discussion progresses.

Impact On Contracts

Whilst we believe that it is unlikely that Brexit will have a significant impact on the interpretation and enforceability of existing or new contracts governed under English law, it will still be necessary to conduct further analysis in the coming months on the potential consequences of Brexit on contracts governed by English law.

Governing Law, Jurisdiction And Enforceability

The choice of governing law for new contracts may be a consideration for lawyers and businesses following the Referendum but the possible changes have, in the main, in our view, been overstated. The concern is that leaving the EU will mean that English courts are no longer bound by the Rome I Regulations[6] and the Rome II Regulations[7] which currently require member states' courts to respect an agreed choice governing of law clause (which will mean that the other member states will continue to give effect to English law contracts). However, even if the UK reverts to English common law without entering in to a new arrangement with the EU, the common law had a solid history of upholding parties' choice of law. Where the parties have not specified a governing law, the principles that would be applied under English common law are broadly similar to those that would be applied under the Rome I & II Regulations. Given the courts' willingness to uphold governing law clauses, the most effective way to remedy any uncertainty surrounding governing law is to include an explicit governing law clause in all contracts.

In contrast to governing law, Brexit does raise questions about the appropriate jurisdiction arrangements post-Brexit when parties have not specified jurisdiction in commercial agreements. At present, the Brussels I Regulation (recast)[8]details how jurisdiction should be determined including factors such as the location of defendants and the place where the "harm" occurred. The Brussels I Regulation also introduced the current enforcement framework for the EU, allowing the enforcement of member state judgments in any other member state without any need for further hearings. Brexit will mean that the UK is no longer part of the Brussels I Regulation. The UK may seek to join the Lugano Convention or the Hague Convention on Choice of Court Agreements (which goes even further geographically than the Brussels I Regulation and includes Singapore and Mexico) to try and preserve the status quo as much as possible, but these agreements do not provide the same level of protection as the Brussels I Regulation. Crucially, the UK will need to find an agreement that means that English judgments can be enforced, without delay or additional cost (for example having to sue on a judgment), in the other EU member states in order to stem any potential flow of litigation on to the continent.

Contractual Clauses

A further discrete point is whether or not parties may consider challenging the validity of contracts on the basis that Brexit represents a force majeure. For example if tariffs are imposed between the EU and UK that significantly change the nature of an agreement, it will be a matter for the court to decide if Brexit can be considered an "exceptional event". Timing of agreements will be crucial in this regard because in order to successfully argue that an event is a force majeure it must be unforeseeable at the date of the contract. In practice, it will be difficult for a party to argue that Brexit was unforeseeable following the Conservative Party's election win in 2015.

Contracts which reference the EU as a territorial jurisdiction may also be the subject of review following Brexit. For example, this will be most relevant in distribution agreements where parties may wish to consider amending terms, where possible, to specifically include or exclude the UK.

Next Steps?

Whilst there is probably no need for a comprehensive document review at present, it would be prudent to consider documentation which may warrant a deeper analysis to identify any potential key issues regarding governing law or the potential trigger of force majeure or material adverse change, or review key contracts which may include references or reliance on the existence of EU/EEA laws or EU/EEA/EFTA membership. In addition, it may be useful to insert "Brexit proof" clauses either

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6 EC/593/2008

7 EC/864/2007

8 EU/1215/2012

by amending existing key contracts or when entering into new contractual documentation. In relation to financial services, there is already a concerted effort to pool together thought on drafting "Brexit proof" clauses and/or concepts of grandfathering provisions, particularly in relation to references to the applicability of EU Directives or Regulations.

Impact On The Use Of The Financial Services Passport

While it is uncertain which model the UK will adopt following Brexit, for now (and unless a "UK specific" alternative is found) only UK membership of the EEA would guarantee the continued use of EU/EEA passporting rights for regulated financial services firms (the "EU/EEA Passport"). Under certain Directives, the UK could obtain passporting rights (in respect of some services and for some types of clients) as a "third country", conditional on the UK's financial services regime being determined to be equivalent by the European Securities and Markets Authority ("ESMA") (the "3rd Country Passport"). Please see our previous client alert and blog on passporting for a more detail.

The availability of a passport varies under each EU Directive, with some Directives such as the Markets in Financial Services Directive II ("MiFID II") and the Alternative Investment Fund Managers Directive (the "AIFMD") providing for the availability of both an EU/EEA Passport and a 3rd Country Passport, whilst the Capital Requirements Directive IV ("CRD IV") does not contemplate for a 3rd Country Passport and the Undertakings in Collective Investment Schemes Directive ("UCITS") does not allow for third country access either. Consequently, firms will need to conduct an analysis on which of its entities is affected under a potential Brexit and what potential options they have available to them if the UK is no longer part of the EU/EEA. From a timing perspective, whilst it is too early to set out in stone what the future relationship the UK will have with the EU, in the next few months and likely before a Brexit occurs, firms will need to start forming views as to what steps (if any) they need to take to ensure they can carry out their business plan effectively within the UK and the rest of the EU going forward.

This decision making may vary depending on the types of activity your entity conducts and what other entities you have in the EU outside of the UK. For example, whilst there may not be an immediate need for a firm which has established both a retail fund platform in the UK and the EU to change anything other than to monitor whether their EU entity will be allowed to delegate certain functions to the UK entity, this may not be the case for banks headquartered in the UK who rely on their EU/EEA passport to conduct banking services.

Obtaining Passport On The Basis Of 'Equivalence'

If the UK leaves the EU (and is not a member of the EEA either), it would be treated as a "third country" for the purposes of EU financial services legislation. As indicated above, some EU Directives grant rights to third country firms to conduct business in the EU on the same basis as EU firms, namely MiFID II, the AIFMD and the Solvency Directive. The question of what meets the criteria for "equivalence" is likely to draw much attention over the coming months and years, particularly as (at present) there is no uniform approach to equivalence across all EU Directives. In addition, the concept of equivalence is fairly new under EU legislation; consequently, it is hard to draw firm conclusions on what tests the UK will need to complete to meet the equivalence test under each EU Directive that provides for a 3rd Country Passport. It is useful to look at the commentary provided by ESMA for the purposes of the use of the 3rd Country passport under the AIFMD detailed below as at least an initial indicator of what may be expected by the EU (please see our client alert on the AIFMD 3rd Country passport).

However, the story of equivalence may not be that simple when we look at the terms set out in ESMA's advice on the AIFMD, which reviewed whether there was a level playing field for competition between the EU and a third country. For example, if the UK were to opt for a "twin track" approach, allowing for parallel tracks for firms to operate or products to be sold in the UK with one set being held out as "EU equivalent" and another set of domestic "regulatory–light" rules for UK firms, a question would open up as to whether this would meet ESMA's criteria for a level playing field for competition purposes?

MiFID II envisages a regime to allow third country firms to provide cross-border services covered by MiFID (such as broker-dealer services) only to more sophisticated or institutional EU clients (namely, per se professional

clients and eligible counterparties). This regime will only be implemented at some point following the application date of MiFID II, January 2018. The principle condition is that the EC adopts an "equivalence" decision in relation to the relevant third country if the EC determines that the third country has prudential and business conduct rules which have equivalent effect to the CRD and MiFID (and the detailed implementing measures made thereunder). The EC must also determine that the third country has an effective equivalent system for the recognition of foreign investment firms. On the assumption that the UK will largely retain the same rules as under CRD and MiFID, the UK's regime may be considered "equivalent" at some date in the future, but this is not certain – particularly if the UK sees a competitive advantage in diverging from some aspects of CRD and MiFID in the future. In addition, there is no particular timetable for the Commission to adopt an equivalence decision. In the meantime, local rules on access by third countries will apply which can be restrictive.

There is no third country passport under MiFID for services provided to retail clients (including individuals and local authorities (and potentially their pension schemes). MiFID allows member states to require any third country firm to establish a branch in the state the service is provided. In practice, third country firms that intend to actively solicit business from retail clients in more than one or two member states will need to establish a separate entity in one state, obtain authorisation for that entity and use the MiFID passport to provide services in all other states.

The grant of the passport under AIFMD to third country firms is at a more advanced stage. ESMA recently published its final advice to the EC, giving the green light to the grant of the passport to managers and funds established in (inter alia) the United States, Guernsey, Jersey, Switzerland and Japan. The conditions in the AIFMD for the grant of the passport are similar (but not identical) to the conditions in MiFID. ESMA's work to date indicates that the key conditions are, firstly, that the third country's regime is suitably robust in terms of supervision and investor protection, and, secondly, that there is a level playing field between EU and non-EU managers as regards market access, in particular whether the third country regime allows marketing by EU managers of their funds on reasonable terms. If the UK retains its AIFMD rules (potentially as an "opt-in" for UK managers), there appears to be no reason why the UK cannot obtain the third country passport – but this is in part a political decision, raising uncertainties as to the criteria which the EC might apply.

Tax

The EU oversees national tax rules to ensure that these are compatible with EU law and policy, but tax rate setting and tax collection generally remains a matter for individual member states. The direct impact of Brexit is likely to be felt only in those areas where the UK regime originates from EU law (such as VAT). Other aspects may change following Brexit, for instance following extrication from EU state aid restrictions and the single market. Much will depend on the precise UK-EU relationship post-withdrawal, and (as always in fiscal affairs) the prevailing economic climate and impact of Brexit on HM Treasury revenues. Implementation of the OECD's Base Erosion and Profit Shifting project ("BEPS Project") is entirely separate to the question of the UK's EU membership and the changes in law arising from the BEPS Project are not expected to be affected by the UK's withdrawal. However, on leaving the EU the UK would not, prima facie, be obliged to implement the recently approved EU Anti-Tax Avoidance Directive, or any other EU measures, aimed at harmonizing the implementation of the BEPS Project throughout the EU, other than by virtue of any terms relating to the UK-EU relationship post Brexit.

Value Added Tax

The VAT system within the EU (UK included) is broadly aligned under EU law. As a large and well established source of revenue for HM Treasury, there is a strong incentive for the UK to maintain alignment with the EU system immediately following withdrawal. However, the UK would also gain the ability to adjust rates and alter VAT exemptions/reliefs after Brexit.

Some implementation and compliance costs of transitioning to any new domestic VAT system should be anticipated. Some areas could be simplified, such as removing the current requirement to submit European Sales Lists of intra-EU B2B supplies. However, there may be a cash flow cost for importers in paying and recovering import VAT on goods received from other EU member states.

Withholding Tax/Double Taxation

The UK has an extensive network of double tax treaties ("DTT"), which operate to reduce or eliminate a number of instances of double taxation and the imposition of withholding tax on certain payments made to and from the UK. The Referendum and Brexit are not expected to affect their operation. As it currently stands, these DTTs are overlaid by two key Directives that eliminate withholding taxes on certain dividends, interest and royalty payments made between associated companies within the EU. In addition, double taxation of dividend payments between parents and subsidiaries within the EU is prevented. Fully outside of the EU, payments made intra-group to and from the UK/EU will cease to benefit from these Directives.

In many cases, the relevant DTT should provide equivalent relief to the Directives, but there are cases where coverage from the relevant DTT is incomplete. This could affect (i) interest payments between certain jurisdictions such as the UK and Italy and Portugal (and vice versa), and (ii) relief from withholding tax on dividends paid to the UK out of certain jurisdictions such as Austria, Germany, Italy and Portugal. In addition (unless a domestic participation exemption applies), domestic tax charges for dividend income received by an EU parent entity from the UK may not be fully eliminated under the relevant DTT.

Recent UK draft legislation[9] increases the scope for UK withholding tax on royalties, to include payments from non-UK companies "in connection with a trade carried on by that person through a permanent establishment in the UK". The UK DTTs with, for example, Luxembourg, Italy and Portugal do not give zero rates on withholding on royalties, so both payer and recipient companies should consider whether a UK withholding tax liability would arise under these new rules.

In addition, certain US DTTs with EU member states, such as the Luxembourg–US DTT provide an exclusion from the limitation of benefits clause where, inter alia, 95% of a company's shares are owned by seven or fewer EU (or in certain cases, EEA) companies. Following Brexit, unless something changes in these DTTs, subsidiaries of UK parent entities will lose this protection.

Additional areas to consider

On occasion, other aspects of the UK's direct tax regime have been held to be incompatible with EU law. A stamp duty reserve tax of 1.5% on UK company shares issued into depository receipt and clearance systems (e.g. Euroclear, Clearstream etc) could be applied, along with the introduction of targeted tax incentive regimes that might previously have been considered as unlawful state aid. Conversely, the UK is likely to lose 'protection' from being discriminated against by other member states. If the UK is no longer bound to respect the EU fundamental freedoms, we may also see a broadening of the current UK Controlled Foreign Companies rules. With the UK outside of the EU, developments towards the EU Financial Transactions Tax and Common Consolidated Corporation Tax Base could be accelerated.

Transaction documentation will need to be carefully considered to ensure the risks from changes in law arising from the UK's departure are considered and adequately addressed. The impact of Brexit on the eventual enforcement of judicial tax decisions that involve questions of EU law is also in question, although current and future litigation will of course be decided on the law in force at the relevant time.

Cross-Border Insolvency

The EU Insolvency Regulation[10] ("EIR") is currently directly applicable in the UK. Its successor, the recast EU Insolvency Regulation[11] ("recast EIR") will apply to proceedings commenced on or after 26 June 2017, until the occurrence of Brexit. Both regulations focus on the allocation of jurisdiction between the courts of member states, with a view to minimising or entirely avoiding competing proceedings. It remains to be seen whether the continued application of the EIR or the recast EIR can or will be negotiated, once the UK leaves the EU.

Existing alternative provisions are of limited assistance. The Insolvency Act requires the UK courts having jurisdiction in relation to an insolvency court to assist courts having the corresponding jurisdiction in "any relevant country or territory", but a) that provision only assists in relation to inbound requests to UK and b) no member state is currently designated a "relevant country or

[9] Once enacted, the rules will be backdated to apply from 28 June 2016.

[10] EC/1346/2000

territory". The UK's Cross-Border Insolvency Regulations[12], implementing the UNCITRAL Model Law, provide for co-operation and recognition between courts and competent authorities involved in cases of cross-border insolvency, but again, this will only assist with inbound requests, as only Greece, Poland, Romania and Slovenia of the other member states have signed up to UNCITRAL.

Schemes Of Arrangement

Over the past 10 years, the restructuring of companies incorporated in member states other than the UK via schemes of arrangement sanctioned by the UK courts has become increasingly popular. While the EIR and the recast EIR have no application to schemes, it is arguable that the EU Judgments Regulation[13] does apply. This is relevant for two reasons. First, it has been argued that its conditions need to be satisfied to establish the jurisdiction of the UK court to sanction a scheme. That argument against scheme jurisdiction could no longer be run if the Judgments Regulation ceased to apply to the UK. Second, it has been argued that the UK court's decision will be recognised in other member states because the Judgments Regulation applies. That is crucial where most of the company's assets are in other member states, as the court wants to be satisfied that its sanction order will have substantive effect. While that argument in favour of jurisdiction could no longer be relied upon, evidence that the order would be recognised on local or private international law grounds has already been accepted by the UK courts in a number of cases covering the key EU jurisdictions other than the UK. Consequently, while it remains to be seen whether the continued application of the Judgments Regulation can or will be negotiated, schemes of arrangement should largely be unaffected.

Arbitration

In the short-term there may be an increase in the popularity of Alternative Dispute Resolution. In the UK this may lead to more parties seeking to mediate their disputes, but in terms of international disputes, arbitration is likely to be a more suitable option given the inevitable uncertainty of the English legal system for the next few years. Arbitration may be particularly attractive to claimants whose counterparties have assets located in jurisdictions where an English judgment would not be enforceable, such as Russia. The reason for this is that the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards has a much broader reach and therefore offers enforcement protections even wider than the Brussels I Regulation. There is also the potential for English litigation to be slow and costly as the courts wade through the new framework and, as a result, arbitration is likely to be considered a solid option for disputes in the short to medium term.

Private Equity Transactions

Following the Referendum very little has changed or is likely to change in terms of the legal framework for carrying out private equity transactions in the UK. Ultimately, this is a matter of domestic (and not EU) law. Implications following Brexit from a tax structuring and merger control perspective should also be considered in PE transactions (and these are discussed separately in this note). By way of contrast, the uncertainty surrounding the terms of the UK's continuing relationship with the EU and the likely timeframe for concluding these negotiations has had a significant impact on market confidence.

From a legal perspective at this stage, it is not possible to provide much clarity as to the legal framework that will apply to UK businesses. That said, from a legal due diligence perspective, there are strategies that can be developed to help navigate this uncertainty in terms of assessing the impact that Brexit might have on possible UK-based investment targets for a PE purchaser (or, indeed, for a vendor diligence piece in respect of existing portfolio companies). Even at this stage, it is possible to identify those sectors and businesses that are more vulnerable in certain Brexit scenarios. Obvious examples of these would include any business with significant cross-border sales of goods or services, which will need to consider the potential impact of customs tariffs, if the UK loses access to the single market. Equally, any

[11] EC/1346/2000

[12] SI 2006/1030

[13] EC/1215/2012

business whose workforce relies heavily on non-UK EU citizens may be impacted if any UK exit treaty involves restrictions on such EU citizens coming to (or continuing to) work in the UK.

Monitoring the UK's negotiations with the EU and how the UK's exit deal is likely to be structured will be crucial. As this process evolves, any potential investment in a target with UK operations will need to involve a careful analysis as part of the legal due diligence process to assess how its business may be affected by changes in law or regulation following Brexit. Furthermore, as we get closer to the date of the UK's exit, transaction documents may include specific provisions relating to Brexit and its implications.

Real Estate

Property laws in the UK are fundamentally domestic systems and consequently Brexit should have a very limited legal effect on UK real estate transactions. Where EU laws impact on UK real estate, such as some environmental and planning legislation which has been implemented into domestic legislation, the expectation is that this legislation will remain in effect post-Brexit.

For the broader UK real estate sector, it is too soon to draw any meaningful conclusion on the long term impacts (if any) of Brexit. In the short term however, there is some market reaction as a result of concerns, for example, over occupier demand, the future viability of some development schemes and a fall in valuations.

In addition, a number of UK open ended real estate funds have restricted redemptions ("gates") to protect the funds' cash buffers and consequently liquidity has been exhausted. Investors have sought to redeem their investments following fund managers revaluing their portfolios after the Referendum. To date, the funds concerned hold a combined estimated total of £15 billion of UK property and industry analysts estimate that £3 billion to £5 billion of those assets could be put up for sale and these assets are likely to be subject to a discount.

There are undoubtedly opportunities for overseas investors to take advantage of the pressure on sterling, low interest rates and Brexit discounts on assets. A large amount of capital has been raised in recent years to invest in UK and European real estate and therefore a number of private equity real estate investors are primed to invest in discounted UK real estate in the next six to eighteen months, including from those property funds which have suspended trading.

Loan And High Yield Bond Market

The Referendum result does not trigger any immediate legal issues for loan and bond deals whilst the UK remains part of the EU. Due to the expectation that Brexit is unlikely to occur before the end of 2016 (and the assumption that there will be a two year window once Article 50 is served), the Referendum result appears to have had minimal impact on the loan and bond market at this point.

Commitment Paper Terms

- **Flex**

  Prior to the Referendum there was discussion of flex terms linked specifically to the Referendum, to enable lenders to re-price or restructure the deal to optimise syndication. These were largely resisted with strong borrowers suggesting the risk should have already been priced into the deal. In the aftermath of the Referendum flex terms appear to be based on the standard risk analysis. In the future this risk analysis may include the invocation of Article 50 and the actual event of Brexit two years later, whilst taking into account the term and timing of the commitment period.

- **Leverage**

  Currently issues such as excess demand from the buy side, quantitative easing and other actions by central banks, and US leveraged lending guidelines are more likely to influence leverage levels rather than the prospect of Brexit.

- **Pricing**

  Recently increased search in the market for yield has influenced pricing more predominantly than concerns related to the Referendum. In the weeks following the Brexit vote, a number of deals priced in the market at levels lower than pricing indications provided prior to the Referendum and there have also been some reversed flexed deals. However, we will need to wait post-summer to see a more accurate state of the market and pricing levels.

Foreign Exchange Issues

In respect of borrowers with sterling revenue but euro or dollar denominated debt and/or multi-currency operating costs which are unhedged (or insufficiently hedged), fluctuations in the value of sterling (including the significant drop following the Referendum) could have an impact on the cash flow of a company as well as the financial covenants. Financial statements for the period ending 30 June 2016 may adversely affect financial covenant ratios if a spot rate is used rather than an average exchange rate for these UK businesses. The possibility of further currency movements and exchange rate risks may result in borrowers revisiting their financial covenants and also assessing whether further hedging would be prudent. The potential increased cost of borrowing sterling and uncertainty in the European loan market may make "Yankee loans" more appealing to European borrowers who can accommodate the exchange rate costs of borrowing in dollars.

Tax Implications

Borrowers should consider the tax implications resulting from their EU group structure. Finance transactions are typically structured to eliminate withholding tax by ensuring lenders qualify for exemptions and the borrowers are therefore not obliged to gross-up their interest payments. These exemptions are generally governed by domestic law, but in certain circumstances the domestic exemption links to EU law and therefore on Brexit may no longer provide relief on withholding tax. In many cases the relevant DTT will provide an equivalent exemption, but some DTTs do not completely eliminate withholding tax. The impact of Brexit on tax issues are discussed further in this note above.

Drafting Considerations

Bond issuers could consider the inclusion of a risk factor in their bond documents warning that market volatility and uncertainty resulting from the Referendum may have an impact upon earnings and ability to access the credit markets. Exposure will be greatest with companies where there is a significant UK business or other UK exposure.

Various Loan Market Association ("LMA") provisions will require additional scrutiny, possibly requiring amendments to existing documentation as well as consideration for new financing arrangements. Typically a loan document includes various covenants linked to a business material adverse change clause, which generally should not result in the Referendum or Brexit triggering a specific event of default which would ultimately allow the lenders to accelerate the debt. Lenders have historically been reluctant to call a business MAC, as it is highly subjective and a direct causal link is required between the event and adverse effect on the business of the borrower group as a whole. Going forward, caution should be exercised when drafting a MAC clause which specifically contemplates Brexit as case law precludes lenders from invoking a MAC if the parties could have anticipated the adverse events at the time of drafting the provisions.

The loss of the EU passport may create issues for UK lenders providing funding to EU entities following Brexit, unless separate licences have been negotiated where necessary. A practical solution may be for a UK financial institution to lend the funds through one of its facility offices in the EU. Illegality provisions in existing loan documentation may be triggered on Brexit requiring prepayment and cancellation in respect of a lender's commitment, so drafting to enable replacement at par, or the flexibility for the lender to transfer the loan to an EU authorised affiliate should be considered (if not already included).

Industry bodies such as the LMA, the Association for Financial Markets in Europe and ESMA are monitoring developments and will attempt to address issues that arise in relation to the finance market. The LMA recommended forms of financing documents contain specific references to EU regulations and directives, although the interpretation provisions qualify that these references are to those laws as amended or re-enacted, which should minimise the impact of potential legislative change upon Brexit. Certain clauses (e.g. the representation relating to COMI and the increased costs clause that refers to CRD IV) may require further amendment when the UK leaves the EU. The LMA will also incorporate any new or replacement laws into their standard forms in due course. In relation to the Bank Recovery and Resolution Directive ("BRRD"), on Brexit EEA lenders will need to include a contractual recognition of bail-in provision in relevant English-law-governed contracts.

Securitisations And CLOs

EUR CLOs, the vast majority of which are managed by UK firms, provide around 30% of the funding to non-investment grade borrowers in the EU. The majority of EUR CLOs are managed by UK MiFID firms which qualify as "sponsors" under the Capital Requirements Regulations ("CRR") and in this capacity they are eligible to act as risk retainers under the CRR. If the UK does not join the EEA and where ESMA has not otherwise recognised the UK regulatory regime as "equivalent" for the purposes of MiFID II, UK managers would no longer qualify as 'sponsors' under the CRR and so would cease to be eligible in this capacity to act as risk retainers in respect of the EUR CLOs which they manage.

Manager Originator Structures

For new transactions, it is possible for a UK manager to "Brexit proof" the structure by changing from a "sponsor" risk retention structure to a "manager originator" structure which does not require the manager originator to have an EU or EEA regulatory status[14]. This structure has already been used by some US managers since 2015 to enable them to market USD CLOs to EU regulated investors. The manager originator structure, as well as requiring the manager originator to manage the CLO, also requires that the manager originator contributes some of the loans or bonds which are acquired by the CLO issuer. The CRR and the delegated regulations thereunder do not prescribe a minimum percentage of loans or bonds which must be contributed by a manager originator (whereas the alternative originator structure, the "non-manager originator" structure, requires non-manager originators to contribute over 50% of the loan or bonds); prior to the Brexit vote, a number of USD CLOs were sold to EU regulated investors with the manager originator contributing 5% of the CLO's assets and since the Brexit vote, the expectation is that more manager originators will come to market having contributed around 5% to 10% of the loans or bonds. There has been some discussion of manager originators contributing less than 5% of the loans or bonds which is possible under the CRR delegated regulations though some investors may prefer a higher level of contribution. The manager originator structure does not require the manager originator to take market risk in the loans or bonds which they contribute: the requirement is that the manager originator be exposed to the credit risk of the loans or bonds before they settle into the CLO issuer. There is no prescribed minimum holding period, but 15 business days has been seen as the period of credit risk in a number of transactions.

Regulatory Changes

In addition to Brexit, the securitisation and CLO markets are also due to be regulated under a new Securitisation Regulation promulgated by the EC as part of the Capital Markets Union initiative (sponsored by UK's former EU commissioner). Under the EC's draft Securitisation Regulation (as approved by the EU Council), the main change proposed to the risk retention regime is the additional requirement that originators established or operated for the "sole purpose of securitising exposures" would not be eligible to act as risk retainers: this requirement (if enacted) would not cause issues for manager originator structures which have the economic purpose of receiving management fees in addition to the returns expected from acting as manager originator risk retainer (this new test would however require non-manager originators to demonstrate their economic purpose beyond acting as risk retainer). Prior to the Referendum MEP Paul Tang unexpectedly proposed some significant amendments to the draft Securitisation Regulation including proposals (i) to increase the risk retention requirement from 5% to 20% and (ii) to limit eligible risk retainers to EU regulated entities. The EC has since attempted to reassure the market that they do not support increasing the risk retention requirement. The Tang proposal to limit eligible risk retainers to EU regulated entities would however cause issues for UK manager originator structures (in the absence of the UK remaining in the EEA or otherwise having its regulatory regime deemed equivalent once MiFID II is in force).

Existing sponsor transactions are expected to be grandfathered but if there is imperfect grandfathering which does not extend to secondary market purchases, this would be an issue for EU investors, who might ask UK sponsors to redeem legacy deals by refinancing via new manager originator structures.

[14] A major debt fund has already priced a manager originator structure in the weeks following the Referendum.

UK securitisations involving a single originator acting as risk retainer (for example most RMBS, credit card, auto and corporate securitisations) will continue to be eligible as non-manger originator risk retainers in a full Brexit scenario but, as with CLO manager originator structures, they would also require restructuring (if marketing to EU regulated investors is required) if Tang's proposal, to limit risk retainers to EU regulated entities, is implemented.

Derivatives

European Market Infrastructure Regulation ("EMIR") stems from commitments made by the G20 nations in 2009, and it will therefore need to be replaced in the UK by a similar piece of national legislation on Brexit. Under EMIR, OTC derivatives can be cleared through an authorised EU clearing house ("CCP") or a non-EU CCP that has been "recognised" by ESMA. An equivalence determination by the EC is a precondition to non-EU CCPs of a particular jurisdiction being granted recognition, therefore a key question will be whether UK CCPs will be granted recognition under EMIR following Brexit. Another question is the extent to which non-UK CCPs (e.g. US or EU CCPs) will be granted recognition under any UK version of EMIR. A reciprocal system for recognising overseas CCPs is required in order to gain the equivalence determination by the EC. Under EMIR, "substituted compliance" with the requirements of another jurisdiction is possible if an equivalence determination has been made by the EC in relation to that jurisdiction and at least one of the parties to the derivatives is established in that jurisdiction. At this point we do not know if an equivalence decision will be made in relation to any UK regulatory regime that replaces EMIR (no equivalence determinations of this type under EMIR have been made by the EC to date.) A similar question will arise under any UK version of EMIR: will it be open to the parties to comply with the EU or US requirements instead?

Other issues affecting derivatives that will need to be monitored include: (i) choice of law/courts; (ii) BRRD e.g. bail-in clauses; (iii) Financial Collateral Directive, and the associated UK regulations; and (iv) insolvency, especially the Credit Institutions Winding-up Directive.

Competition

The impact of Brexit on the merger control process for M&A transactions involving a UK component will very much depend on the post-exit model chosen. For merger control purposes, the key distinction will be whether the UK adopts:

- **the Norwegian Model** following the model adopted by Norway, Liechtenstein and Iceland, which is implemented through the EEA and EFTA agreements and allows the EC to retain exclusive competence over merger control transactions with EEA-wide impact; or
- **any of the other models currently under discussion** (the so-called Swiss, Canadian, Turkish and WTO models as detailed above), each of which would result in the UK coming out of the EU merger control regime.

If Brexit takes the form of the Norwegian Model, it will largely be business as usual: the EC would retain exclusive jurisdiction for mergers with an EU dimension, whilst the UK's Competition and Markets Authority ("CMA") would retain its current role for transactions that do not qualify for EC review.

If Brexit follows any of the other models, the EC would no longer have exclusive competence for merger control in relation to concentrations impacting UK trade. Depending on whether jurisdictional thresholds are met, this could result in the CMA and the EC having concurrent jurisdiction to review certain transactions. Overall, this would likely result in a greater filing burden and cost for private equity buyers than under the current one-stop shop regime, although the impact on individual transactions would be fact-specific: in practice, for as long as the UK's merger control regime remains voluntary and non-suspensory, a private equity acquisition which does not give rise to UK competition concerns should continue to proceed without a UK filing. However, in the minority of cases, if deals do give rise to competition concerns in the UK, they may be subject to review by both the CMA and the EC. All things being equal, we would not expect an exit on a non-Norwegian model to result in a change in merger control policy or significant divergence between the EC and the CMA, at least in the short term. The CMA will

likely remain a member of several international competition law networks, the aim of which is to promote alignment of competition law application. However, if there were to be a more protectionist steer from the UK government post-Brexit, and if the current trends of increased UK government influence over the CMA's activities continue, there is a possibility of divergence in the future.

There are two other potential developments to highlight if Brexit involved the UK falling outside the EU merger control regime. First, this may prompt the CMA to reconsider the nature of its own regime, and a potential move to a mandatory and suspensory model. Clearly, this would result in greater cost and complexity for private equity deals involving the UK. Secondly, there is a possibility that English may cease to be a working language of the EC. That would mean either that EC merger control notifications would require translation or that private equity firms may choose to use European lawyers with appropriate language skills.

Data Protection

The UK Data Protection Act 1998 ("DPA") currently remains in force. All processing of personal data must be undertaken in accordance with the DPA, and the EU General Data Protection Regulation ("GDPR") will be enforced within the EU from 25 May 2018. Organisations that provide goods and/or services in or to the EU are, for the most part, preparing for GDPR implementation and UK organisations should continue to do the same. Reform of UK data protection law remains necessary, but it is unclear whether the GDPR will be adopted in the UK.

Currently, the DPA allows for personal data to be transferred freely between member states and those countries covered by EC adequacy findings. The DPA also provides that consent, model clauses, binding corporate rules ("BCRs") and self-assessed adequacy may be used to legitimise transfers of personal data outside the EU. The EU-US Privacy Shield was also adopted on 12 July 2016 as a means for legitimising data transfers to the USA.

What Is The Impact On Data Protection Under The Potential Future Options?

The future of UK data protection law will be influenced by the agreements that the UK reaches with the EU. Possible data scenarios are set out below.

- **Implement the GDPR (or an equivalent)**
  The UK may decide to implement the GDPR (or something very similar) and repeal the DPA. This should assist in the facilitation of continued trade links with the EU, and would likely result in an adequacy finding in the UK's favour.

- **The Norwegian Model**
  Under a Norwegian Model, the UK would need to adhere to the GDPR from 25 May 2018, both before and after Brexit. Under this option, data transfers from the UK across the EEA would be permitted freely. The UK would likely also be able to continue to rely on any EC adequacy decisions in respect of non-EU countries, as well as the EU-US Privacy Shield decision.

- **The Adequacy Route**
  If the UK were to leave the EU and does not become part of the EEA, it would be treated as a third country by the EU for the purposes of international personal data transfers. If the UK retains the DPA and does not implement an equivalent to the GDPR, then it is likely that no finding of adequacy would be made in respect of the UK, as the GDPR is more robust in its protection and requirements than the DPA (the Investigatory Powers Bill also makes an adequacy decision even less likely). In this scenario, all personal data transfers to the UK from the EU would need to be legitimised by model clauses, BCRs, consent or any of the other safeguards or derogations available under the GDPR. This would likely require many organisations to review commercial contracts and data sharing arrangements that are currently in place to ensure ongoing compliance.

- **An EU-UK Privacy Shield?**
  If the UK decided to remain outside the EEA and no EC adequacy decision was made in respect of the UK, it might be possible to implement an EU-UK

"privacy shield" type arrangement similar to the EU-US Privacy Shield.

- **A Dual System?**
  Finally, the DPA could remain in force and be applied to all international data flows from the UK outside the EEA when a controller is established in the UK, where the processing of personal data takes place exclusively in the UK and the processing is limited to UK citizens. For all other international transfers the GDPR would apply. Although this could assist small UK businesses, the complexity of administration makes this impractical.

It remains unclear which option the UK government will choose prior to May 2018. For most organisations, the prudent course of action based on the information available would be to continue with preparations for GDPR compliance.

Intellectual Property

On Brexit the UK intellectual property, ("IP") scheme (and to some extent the European IP scheme) is likely to become more complex. Harmonized EU IP laws may change in time, resulting in potential inconsistency. Individual IP rights are likely to be affected differently, with pan-EU rights, such as registered EU Community trade marks and designs, being more affected than national rights such as patents, copyrights and rights to prevent passing off/unfair competition. When Brexit occurs, unless specifically addressed in UK legislation, EU derived IP rights will no longer be recognised in the UK.

Consideration will also need to be given to the impact of cases that have been decided in accordance with prior EU judgments or decisions.

Patents

Until Brexit occurs, unless repealed, the Patents Act 1977 would remain in force regulating patents in the UK. In most cases, UK patents are nationalized versions of European patents granted by the European Patent Office ("EPO"). There would be no legal impact on the existing patent rights, as the EPO is independent of the EU. Brexit is also unlikely to affect the UK's participation in the Patent Cooperation Treaty, the Paris Convention and the European Patent Convention, as these are all treaties outside of the EU.

However, Brexit may influence the UK's introduction of the Unitary Patent Scheme and the Unified Patent Court ("UPC"), which are due to take effect in 2017– although ratification of the agreement is still legally possible.

Brexit will likely delay and potentially impair the introduction of the UPC throughout Europe. Before the UPC can start, it must be ratified by at least 13 member states, including the UK. The UPC thus cannot start anywhere in Europe while the UK remains an EU member but has not ratified the UPC, unless the UPC agreement were to be renegotiated to remove the UK ratification requirement.

Trade Marks

Following Brexit the Trade Marks Act 1994 (unless repealed) would remain in force for the regulation of registered trade marks in the UK. The UK would no longer be part of the EU Trade Mark ("EUTM") system, as it is only accessible to member states. This would undermine the enforceability in the UK of existing European Trade Mark registrations. It is possible that a conversion process will be needed to convert EU Trade Marks to UK National Trade Marks and ensure the continuity of rights. Until then, all EU Trade Marks registered or awaiting registration will continue to benefit from protection within the UK and other member states.

EU Design Rights

Registered EU Community design rights cover all member states and further legislation will be expected in order to preserve them. The UK may allow all existing EU designs to apply and later allow conversion into UK designs.

Copyrights

Copyright protection is not fully harmonized in the EU and is mostly based on domestic law. It is unlikely that Brexit will impact significantly on UK copyright.

Database Rights

Database rights are protected in the UK under the Copyright and Rights in Databases Regulations 1997.

Like copyright, such rights are automatic and Brexit is unlikely to affect their formalities or protections. However, the Regulations refer to an individual or a body incorporated in an EEA state in order for the database right to be qualified, which would, perhaps, require amendment.

Conclusion

Given the uncertainty surrounding Brexit, the long term impact on IP rights in the UK is still unclear. The UK government will have to work closely with the EU in the future to fill the gaps in the areas of EU trade marks and design rights and, possibly, in unitary patents and the UPC. The UK Government will likely delegate the responsibility for scoping the new IP landscape to the UK Intellectual Property Office and the increase in its administrative function may result in increased filing costs for those registering or renewing IP rights in the UK.

Government Enforcement/White Collar Crime

EU influence over criminal law and criminal justice is exercised in five general areas:

- **Substantive criminal law** legal instruments such as Directives and Regulations intended to harmonise the development of the substantive criminal law in areas such as money laundering and people trafficking;
- **Criminal procedure** measures intended to influence national criminal procedure such as those concerning the standing of victims in criminal proceedings and the rights of defendants;
- **Police cooperation** measures intended to enhance police cooperation such as sharing of fingerprint and DNA information;
- **Mutual recognition** measures intended to enhance the recognition of criminal decisions and warrants between member states, such as the European Arrest Warrant and mutual assistance in freezing assets; and
- **EU policing agencies** Europol (which plays a coordination and intelligence role between the policing agencies of member states) and Eurojust (which plays a coordination role for prosecutors).

Prior to the Referendum the UK had opted in to a small number of EU criminal law measures (such as child sexual abuse and human trafficking) and a handful of measures relating to the rights of suspects. It seems unlikely that these measures will be reversed in the UK on Brexit.

Most EU law in the field of criminal justice (since the Lisbon Treaty in 2009) has been enacted via EU Directives that are then implemented in the UK by way of secondary legislation. Noteworthy among these Directives is the forthcoming 4th Money Laundering Directive ("4MLD"). There are, at the time of writing, proposals for the implementation date of 4MLD to be brought forward to early 2017 in response to the increase in terror-related attacks in Europe. Whether these proposals are adopted or not, the UK will be required to give effect to 4MLD well before the UK has formally left the EU. Moreover it seems unlikely that the UK will want to undo the effects of 4MLD as many of the changes contained in 4MLD come themselves from Financial Action Task Force recommendations.

Following Brexit it remains to be seen how the UK might adopt or follow criminal laws originating in the EU. It seems unlikely that the UK will want to withdraw completely from areas such as cross border policing cooperation. It also seems unlikely that any significant consequences would follow from the UK's ceasing to be bound by the EU instruments designed to harmonise aspects of substantive criminal law or procedure such as cybercrime or people-trafficking.

LONDON OFFICE | PARTNER CONTACTS

FINANCE

Maurice Allen
Partner
+44 20 3201 1508

Tania Bedi
Partner
+44 20 3201 1623

Matthew Cox
Partner
+44 20 3201 1626

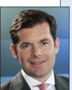
Mike Goetz
Partner
+44 20 3201 1629

Benoit Lavigne
Partner
+44 20 3201 1551

Chris McGarry
Partner
+44 20 3201 1637

Partha Pal
Partner
+44 20 3201 1641

Mark Wesseldine
Partner
+44 20 3201 1649


Fergus Wheeler
Partner
+44 20 3201 1650

ANTITRUST AND COMPETITION

Ruchit Patel
Partner
+44 20 3201 1702

TAX

Brenda Coleman
Partner
+44 20 3201 1625

HIGH YIELD

Robert Haak
Partner
+44 20 3201 1532

Michael Kazakevich
Partner
+44 20 3201 1634

Jane Rogers
Partner
+44 20 3201 1643

SPECIAL SITUATIONS

Peter Baldwin
Partner
+44 20 3201 1604

James Douglas
Partner
+44 20 3201 1628

Tony Horspool
Partner
+44 20 3201 1632

Dan Martin
Partner
+44 20 3201 1635

ASSET MANAGEMENT

Anand Damodaran
Partner
+44 20 3201 1627

Monica Gogna
Partner
+44 20 3201 1630

Matthew Judd
Partner
+44 20 3201 1633

Michelle Moran
Partner
+44 20 3201 1638

PRIVATE EQUITY

John Newton
Partner
+44 20 3201 1640

Will Rosen
Partner
+44 20 3201 1644

Philip Sanderson
Partner
+44 20 3201 1646

Kiran Sharma
Partner
+44 20 3201 1647

GOVERNMENT ENFORCEMENT AND BUSINESS SECURITIES LITIGATION

Amanda Raad
Partner
+44 20 3201 1642

Thomas Ross
Partner
+44 20 3201 1645

Marcus Thompson
Partner
+44 20 3201 1648

REAL ESTATE

Carol Hopper
Partner
+44 20 3201 1631

Iain Morpeth
Partner
+44 20 3201 1639

IP TRANSACTIONS

Rohan Massey
Partner
+44 20 3201 1636

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NEW YORK | WASHINGTON, D.C. | BOSTON | LONDON
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