MASON HAYES & CURRAN

Brexit

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Now that Article 50 has been triggered, businesses should assess and plan for the likely legal and tax implications of Brexit now so that they can seek to mitigate risk and exploit opportunity.

There is no immediate change to law. Britain remains in the EU and subject to the primacy of EU law until the conclusion of the negotiating process. But in the medium to longer term the changes will likely be profound, widespread and complex given the extensive intermingling of national UK law and EU law.

Financial Services

Brexit will have major implications for UK-based financial institutions that use the EU's rules on freedom of establishment and freedom of services to access EU financial markets.

The 'passporting' system of licences for banking, insurance, investment funds, asset management, payment services, e-money etc, will likely cease. Different licence requirements for the UK and the EU are likely.

One option for such institutions would be to apply for a full licence in each of their target EU jurisdictions. But applying and maintaining such licences and operations on the ground is time consuming and expensive.

We may, consequently, see some financial institutions opting for an alternative, which would be to move their headquarters from the UK to another jurisdiction within the EU from which to passport their financial services. Ireland is an obvious choice in this regard, as the only remaining English speaking member state in the EU, and its highly respected international financial services offering.

Infrastructure & Energy

Ireland's energy markets are closely connected to those in the UK and to date the regulatory regimes in both countries have worked well together. This is largely because a significant amount of the applicable energy regulation, in both the UK and Ireland, derives ultimately from EU legislation. Over time we may see the regulatory regimes diverging, with implications for our energy markets.

Energy and infrastructure connections between Ireland and the UK, especially Northern Ireland and Wales, may be affected by Brexit, in particular because:

- The electricity generated and consumed in Ireland and Northern Ireland currently passes through a common wholesale electricity market, the Single Electricity Market
- A 500MW sub-sea electricity interconnector has been built between Ireland and Wales
- EirGrid, the transmission system operator on the island of Ireland, is planning to build a 400MW cross-border transmission line across the border between Ireland and Northern Ireland
- Much of Ireland's natural gas is imported through two sub-sea pipelines running from Scotland, and a "South-North pipeline" runs from Gormanston, Co. Meath, to Belfast

Brexit may not have an immediate impact upon the continued smooth operation of these energy markets and assets. Nor should Brexit disturb the extent to which the Irish elements of these arrangements continue to comply with European law.

Under the I-SEM project, the Single Electricity Market is currently being modified for the primary purpose of aligning it more closely with the "target model" that is favoured by the European Union. However, this project will also align the Irish wholesale market more closely with that of Great Britain, and will facilitate enhanced electricity exports between the two markets. The I-SEM project therefore has merit, even if Northern Ireland is no longer obliged to pursue it for reasons of compliance with European law. We do not expect that the I-SEM project will be a casualty of any Brexit.

Technology

We see two key issues that arise for technology and internet services companies as a result of Brexit:

1) It is likely that, despite Brexit, the UK will need to comply with EU data protection laws
2) The transfer of data from EU member states to the UK may become more complicated

Probable data protection laws by the UK

The UK's data protection laws, which are primarily set out in the UK Data Protection Act 1998, derive from EU law. It is possible that the UK may seek to use Brexit as an opportunity to repeal or significantly amend the UK Data Protection Act. This agenda may get additional impetus from the recently adopted General Data Protection Regulation – GDPR. The GDPR will come into force on 25 May 2018 and will significantly toughen data protection rules in the EU.

The UK may retain EU data protection law, including the high standards contained in the GDPR. This is primarily because:

- The GDPR is a "text with EEA relevance" so, if the UK wants to join the European Economic Area, it will need to adopt the GDPR
- UK businesses that deal with other EU countries will still need to comply with the GDPR. This stems from the GDPR's expansive scope. The GDPR will apply to companies based outside the EU that offer goods or services to individuals located in the EU
- If the UK seeks an EU Commission adequacy decision to get over the data transfer issues, it will need to comply with the GDPR

Data transfer complications

If the UK does not join the European Economic Area, serious issues will arise with respect to the free flow of data between the EU and the UK.

EU data protection law prohibits transfers to countries that do not provide an "adequate" level of protection for personal data. Only a handful of countries are recognised as meeting this standard. This means that transfers of personal data between the EU and the UK could be presumptively unlawful and may only take place if certain derogations apply. This could include the use of EU Commission approved model contractual clauses.

However, international data transfers are a fraught area at present. The Irish Data Protection Commissioner recently commenced proceedings in the High Court seeking a referral to the CJEU and a declaration that model contractual clauses are themselves in breach of EU law, at least where used for transfers to the US. Litigation of this sort may make it more challenging to address data transfers between the EU and the UK.

If the UK does not join the EEA, it may ask the Commission to issue a decision finding that UK law is "adequate" for the purposes of international data transfers. However, this could give rise to three sets of difficulties.

- First, such an adequacy decision could only be forthcoming if UK law was "essentially equivalent" to EU data protection law. This means that the UK would have to adopt the GDPR
- Second, it is far from clear that there would be a political will to issue such an adequacy decision, which must be approved by member state representatives via qualified majority voting
- Third, certain MEPs have already come out and said that they will campaign against the UK getting an adequacy decision as a result of its national security laws and online surveillance practices

Commercial

We analyse this in two parts covering existing contracts and contracts being negotiated now.

Existing contracts

- The legal enforceability of existing commercial contracts should not generally be affected by Brexit
- Enforceability issues will likely only arise if the operation of a particular contract was wholly or largely dependent on the on-going operation of particular EU legislation in the UK
- EU laws relevant to commercial contracts have largely been incorporated into UK law, and we do not expect they will be repealed any time soon. Furthermore, UK contract law and rules of interpretation have largely developed through case law, rather than EU regulation
- However, most pre-Brexit contracts will have been drafted on the assumption of the UK's membership of the EU. For this reason it is recommended to conduct an audit of contracts to identify which are subject to UK laws, and which have a term exceeding the two-year negotiating window before the UK formally leaves the EU
- Any contracts that define the EU as its territorial scope should be amended to identify the United Kingdom and the EU. This will be relevant, for example, for distribution, agency and franchise agreements

Future contracts

- The uncertain nature of withdrawal terms suggest that termination rights for certain contingencies, such as exclusion from the single market, should be negotiated
- Brexit's impact on the free movement of goods and services may increase the cost of doing business with UK customers. Trade barriers between the EU and UK may require a renegotiation of prices and/or the level of risk a party is willing to take
- Contracts which involve a human resource travelling to or from the UK, such as consultancy services, may become more cumbersome and expensive
- As UK and Irish laws diverge, commercial contracts will have to address legal issues that were previously aligned in each jurisdiction. For example, UK and Irish competition law, which restrict unfair practices by dominant or colluding companies, may become subject to diverging regimes, the legal implications of which will have to be dealt with when entering into commercial contracts with a cross border element
- Parties should consider the governing law of new contracts. If a common law system subject to EU primacy is desired then Irish law is an obvious choice

Corporate

Now that Article 50 has been triggered, market uncertainty and volatility is set to continue. Volatility presents a number of practical challenges for companies such as agreeing deal valuations, more cautious lending and potentially an increase in shareholder activism.

However volatility arising from Brexit also creates market opportunities for well-capitalised corporates and private equity as companies come under cost pressure to consolidate or restructure their portfolio through the disposal of non-core assets.

In the medium to longer term, we expect deal flow to rise, in particular as corporates and private equity companies identify and take advantage of market opportunities.

Transactional costs may increase for some deals. Deals involving companies with UK trade will no longer be able to take advantage of the EU's one-stop-shop when it comes to merger control approval and may have to get separate approval from the relevant UK authorities.

There are three areas where the legal effect of Brexit on M&A and corporate finance will be noticeable:

- Existing deals
- Structuring of future deals
- EU-related company law

Where an existing deal is awaiting a condition to fall in – eg a regulatory or third party consent – it is not unusual for there to be a material adverse change condition. In private deals it is possible that the market turmoil caused by Brexit would entitle a party to invoke such a condition with a view to abandoning the deal.

In the case of any quoted company takeovers, there is a very high bar to get over in order to satisfy the Irish Takeover Panel so that an offeror would be entitled to walk away from a takeover bid; Brexit would not succeed so as to satisfy such a condition.

In future deals we anticipate careful drafting of conditions related to the nature of the UK's ultimate departure from the EU – will it be EEA, Canadian, Turkish or WTO? It will be easier to express the conditions by reference to these tangible possible outcomes rather than by relying on a general material adverse change condition.

If the UK leaves the EU without remaining in the EEA, the cross-border mergers using the EU law will be impossible. Any Societas Europaea (SEs) with their seat in the UK could lose their legal basis and could also be required to transform into a UK entity or migrate to an EU Member State.

Similarly, if the UK exits the EEA, then UK companies raising money on the markets will require the approval of the prospectus by an EEA Member State regulator. It would be in the same position as, for example, US companies, which must choose an EU "home Member State" for regulatory purposes. This will increase costs for UK companies as they would have to satisfy two regulators – the FCA and an EU home Member State regulator.

In addition, insolvency practitioners may no longer be able to rely on the EC Regulation on Insolvency Proceedings for automatic recognition of EU proceedings in the UK and vice-versa.

Employment & Pensions

Certain aspects of employment laws were hotly debated during the run-up to the Brexit referendum. In time we may see significant change which could be of relevance to Ireland. These include:

- A form of amnesty for non-UK citizens resident in the UK is considered probable, but new entrants to the UK are likely to face hurdles including visa requirements, which would have major implications for Irish citizens travelling to work in the UK. Any bi-lateral arrangement between the UK and Ireland will need the consent of the EU
- Much of the UK's employment laws originate from EU directives. Following Brexit, it will be possible for the UK to repeal this legislation. Agency workers legislation is considered to be the most vulnerable area of UK employment law, post-Brexit. Collective redundancy requirements may be relaxed further
- The transfer of workers with undertakings is an area of great uncertainty post-Brexit. There are strong advocates on each side for the merits of retaining TUPE style regulation compared to the opportunity to shed the costs of TUPE regulation. Given the uncertainty, outsourcing contracts with UK counterparts would need careful drafting to manage longer term risks and benefits
- The future of UK/Ireland cross-border pension schemes has been thrown into doubt. The establishment of these arrangements was made possible through European legislation which may not be retained. There may be a need to conduct an "unwinding" of existing UK/Ireland cross-border pension schemes. Cross-border pension schemes that were previously "hosted" from the UK may consider moving to Ireland or another EU country
- Funding of defined benefit pension schemes has been hit by negative movements on financial markets following Brexit. Defined benefit schemes that are the subject of funding proposals may see those proposals falling "off track". This would result in the requirement to agree and submit revised funding proposals to the Pensions Authority. Defined contribution pension schemes will also have to ensure that their default investment strategy is sufficiently diversified
- The cost of purchasing an annuity at retirement has risen in the wake of Brexit and people may be looking at a significant reduction in their pension purchasing power. Trustees and employers may want to seek advice in relation to possible alternatives to purchasing an annuity at retirement

Intellectual Property

Registered European trademarks and designs

While domestically registered trademarks and designs in the UK will be unaffected, Brexit will affect the protection afforded in the UK for those who have registered European Union Trade Marks ("EUTMs") or designs. It is almost certain that EUTMs and designs will eventually cease to have effect in the UK but it is hoped that transitional arrangements will be negotiated as part of the UK's exit from the EU. These transitional arrangements could include the ability to convert EUTMs and designs into corresponding UK trademarks and designs. Trade mark and design owners will need to follow the negotiations closely as some administrative action will likely be required.

For those companies who rely on use in the UK for their EUTMs, further action may be required as EUTMs may become vulnerable to cancellation following a UK exit.

Unregistered trademarks and designs

The law of passing off in the UK, similar to our own in Ireland, will be unaffected. However, for companies who rely on the protection afforded by the Community Unregistered Design, this will likely cease to apply in the UK and reliance may have to be placed on the domestic unregistered design right in the UK.

Copyright and database rights

It is unlikely that copyright and database rights will be appreciably affected in the short-to-medium term. However, as copyright and database rights have been largely harmonised at EU level, in the longer term, EU and UK protection of copyright and database rights may diverge.

Patents

National UK patents will remain unaffected and for those applying for patents in the UK nothing much will change either. This is because the UK is a party to the Patent Co-operation Treaty and the European Patent Convention, neither of which rely on EU membership for effect. On the other hand, the coming into effect of the Unitary Patent and the Unified Patent Court (UPC) could be significantly delayed as the UK is a compulsory member for the UPC to take effect.

Tax & Tariffs

The certainty of Ireland's ongoing EU membership also provides opportunities for businesses to plan now for the UK's EU exit based on existing Irish and UK tax law. The VAT "one-stop-shop" arrangements for pan-EU traders may cease in the UK post-Brexit. Businesses may wish to consider methods of relocating to Ireland to avail of this facility. Such arrangements may involve cross-border mergers into Ireland using EU-based provisions for deferring UK exit taxes or otherwise avoiding any such taxes. The use of Irish incorporated holding companies to avail of EU grouping tax exemptions may also increase and become a substitute or an alternative for UK incorporated holding companies.

Tariffs and customs duties could arise on the supply and acquisition of goods and services across the border with the UK and Northern Ireland, although it seems likely to us that there will be an attempt to avoid such barriers to trade during Brexit negotiations.

Much of Ireland's legislative direct tax system is likely to remain unaffected by Brexit and therefore there is a degree of certainty for businesses looking to invest in Ireland and benefit from its EU membership. Ireland's tax law has been drafted to avoid fiscal obstacles to trade, for example, withholding taxes, where the overseas party is either a member of the EU or like the UK has a double tax treaty with Ireland. Dividends paid to an EU resident other than an Irish individual do not attract 20% withhold. When the UK leaves the EU, there will still be no such withhold by reason of Ireland continuing to have a double tax treaty with the UK.

While there will be no immediate impact on VAT charging and its recoverability, Brexit could ultimately result in the loss of VAT zero rating on business to business supplies, within the EU. Also, the UK will lose the benefits of EU directives on absence of withholding taxes on monetary flows, eg parent/subsidiary.

In terms of challenges facing the Irish economy in light of Brexit, we would expect the UK to significantly enhance its tax offering to attract inward investment by way of tax competition. This may include offering incentives for inward investment that under EU rules would constitute illegal State aid, but which may no longer apply to the UK.

On the international front, the ability to avail of the Ireland/US double tax treaty will be somewhat curtailed under the limitation of benefits clause where an Irish company is ultimately owned by EU residents that are based in the UK, although the policy makers in Washington may see fit to add a protocol to the Treaty to enable UK residents to benefit post-Brexit.

Declan Black
Managing Partner

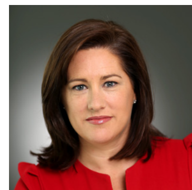
t +353 1 614 5017
e dblack@mhc.ie

Fionán Breathnach
Partner,
Head of Investment Funds & Financial Regulation

t +353 1 614 5080
e fbreathnach@mhc.ie

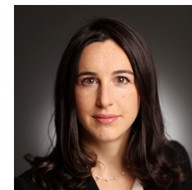
William Carmody
Partner,
Financial Services

t +353 1 614 5097
e wcarmody@mhc.ie



Melanie Crowley
Partner,
Head of Employment Law & Benefits

t +353 1 614 5230
e mcrowley@mhc.ie



Niamh Keogh
Of Counsel,
Tax

t +353 1 614 5848
e nkeogh@mhc.ie

MHC.ie

If you have any questions on Brexit, please contact your usual Mason Hayes & Curran contact or one of our team at:

MHC.ie/brexit or brexit@mhc.ie

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