What next?
Steps to take today as the UK votes to leave the EU
June 2016
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Creating your own certainty

The UK voted yesterday to leave the European Union. Pinsent Masons research showed that just weeks before the vote most businesses were not prepared for the impact of a ‘leave’ vote. So what are the first steps companies should take, now that Brexit is a reality?

We have picked some of the biggest commercial, operational and legal issues to focus on in this checklist. Use it to guide your initial response to this morning’s news and act quickly.

Time is tight. Unless every single EU country agrees to extend the deadline then the UK will leave the EU in around two years time – the clock starts ticking when formal notice to leave has been served, though there is no rule about when that notice must be given.

That is a short period for such a drastic change, and businesses need to prepare for an uncertain future. The UK may negotiate new trade agreements in that time. If the UK becomes part of the European Economic Area (EEA) or European Free Trade Area (EFTA) then it will still be bound by existing EU legislation and free movement of person principles.

If it doesn’t agree new trade deals with the EU or other countries then the default position is trade under World Trade Organisation (WTO) terms, which we outline later.

Uncertainty is unsettling, but when assessing the risks don’t forget that the upheaval may bring opportunities too.
Checklist
Assessment of the impact of Brexit

Nobody knows what kind of trading relationship negotiations with Brussels and other countries will produce, but there are steps companies can take right now to understand the areas where exit from the EU will affect them most.

Anyone doing business between the UK and EU countries should try to identify now what areas of their operations will be affected and how. Brexit may also affect the basis on which UK businesses trade with business in non-EU countries.

Next steps:
If you have not already planned pre the referendum you must:

- Do a stock-take of what you currently do or plan to do with the EU and third party states
- Consider the potential impact on those activities and plans of Brexit, including of trading on WTO terms (see later in the document).

Consider:
- Is Brexit likely to have a material impact on the business, and if so, is that likely to be favourable or adverse?
- Are there any material commercial opportunities likely to arise from Brexit?
- Are there material risks or threats likely to arise from Brexit?
- Are there issues arising from Brexit on which to lobby Government?
- Should there be engagement with investors or shareholders in relation to the likely impact of Brexit on the business?
- Are there any other possible consequences of Brexit which need to be explored?

For sector specific updates and further insights see www.out-law.com/brexit
Employees

Although much of UK employment law originates from the EU we are not likely to see the mass unravelling of these provisions. Removing all the worker protections would not only be politically difficult but some regulations derived from EU law such as the Transfer of Undertakings provide businesses much-needed certainty around transfers.

What changes might we see?

We may well see amendments to Working Time Regulations (WTR) around holiday pay and the 48 hour average weekly working time limit; The Agency Workers Regulations (AWR) in relation to core terms and conditions; some aspects of TUPE such as the restrictions to changing terms and conditions; and a repeal of the Human Rights Act (HRA) in relation to trade union protections and the right to freedom of association.

Next steps:

Unless negotiated otherwise, the EU principle of the free movement of workers would no longer apply, impacting the management of a cross-border skilled and experienced workforce. Removing this right could mean that UK employers sending staff abroad would have to go back to applying for visas. Equally, EU nationals working in the UK may lose the right to live and work here without a visa. Work with HR to:

- Identify employees from EU member states working in the UK and assess the business impact if, post-Brexit, they are unable to continue to do so
- Identify UK employees working in other EU states and assess the business impact if, post-Brexit, they are unable to continue to do so
- Assess the extent to which the UK business relies upon using employees from other EU states and how the business could best minimise the impact if they were unable to continue working in the UK
- Assess the extent to which the business in other EU states relies upon using employees from the UK and how the business could best minimise the impact if they were unable to continue working in the EU
- Work out if any employee policies or groupings (eg. EU-wide workers’ councils) which may need to be reviewed in the light of Brexit.
Data transfer from the EU to locations outside of the EEA is prohibited unless the European Commission designates the UK as a territory that provides for adequate data protection, a so-called ‘adequacy’ provision. An adequacy decision would mean organisations could more freely transfer personal data to the UK from destinations in the EU than would otherwise be the case. Achieving this is key to the retention of the UK’s competitive position; not doing so will undoubtedly have cost and associated administrative burdens for business.

What changes might we see?
There might be some flexibility for the UK to exempt businesses from some of the more burdensome provisions of the General Data Protection Regulation whilst still benefiting from an EU adequacy decision.

Obligations on organisations to employ data protection officers and stife rules around consent could potentially be relaxed. We might see smarter policy making to support the use of big data analytics in the UK in medical research, where the UK is a global leader, and in a number of other areas. How the UK would manage to achieve that and at the same time ensure it received an EU adequacy finding to support cross-border trade would be a vital question.

Customer and third party data
It is unlikely that a UK exit from the EU would spark a major change of direction on data protection policy from that being pursued under the EU General Data Protection Regulation, which is due in 2018.

Next steps:
If the UK did not benefit from an adequacy decision by the Commission, data transfer arrangements would be more cumbersome. Firms would probably need to deploy a range of legal, technical and organisational measures to underpin those transfers, with precise measures changing possibly on a case-by-case basis. Businesses should now seek to:

• Establish what customer and third party data is held by the business, where that data is held and who owns the data

• Establish the materiality of the data to the business and what, if any, action should be taken in relation to the data to protect the business

• Assess if Brexit affects ownership, use or licensing of the data

• Establish what consents have been obtained from data owners, how the data is currently used or licensed, and how it is regulated

• Establish if there are any proposals as to how the data should be used or licensed in the future.

For sector specific updates and further insights see www.out-law.com/brexit
Procurement

In England, Wales and Northern Ireland the main rules are the Public Contracts Regulations 2015 and the Utilities Contracts Regulations 2016 and Concessions Contracts Regulations 2016. In Scotland, the principal legislation is the Procurement Reform (Scotland) Act 2014 and, the Public Contracts (Scotland) Regulations 2015 and the Procurement (Scotland) Regulations 2016. If the UK becomes a member of EFTA, giving access to EU free trade agreements, it would still need to adopt EU procurement rules.

What changes might we see?

In the event that this is not the case, the UK will still need to have some form of continued relationship with the EU, making a change of tack on policy unlikely in the UK in the immediate months and years. Indeed, the reality is that whilst European procurement law is about the opening up of borders to pan-European trade, at a domestic level it is also an important part of attempts to deliver value for money. In light of this some standardised, mandated approach to competition is always likely to be required.

With this in mind, it is also worth remembering that the UK’s approach has been to go beyond the minimum requirements set by EU law. An example of this is the incorporation of the ‘Lord Young reforms’ in the Public Contracts Regulations and use of the Cabinet Office standardised pre-qualification questionnaires in England and Wales, and the steps being taken throughout the UK to encourage the use of social objectives in purchasing. Similarly, in Scotland, the Procurement Reform (Scotland) Act 2014 has also extended certain key policy objectives into the procurement environment.

Next steps:

• Assess if there is a need to review suppliers in light of Brexit-related contingencies or risks

• Are there goods or services which it may be advisable to procure early, or in greater volume, to minimise Brexit-related contingencies or risks?

• Should you delay the procurement of some goods or buy in smaller volume, to minimise Brexit-related contingencies or risks?

If the UK becomes a member of European Free Trade Association (EFTA), giving access to EU free trade agreements, it would still need to adopt EU procurement rules.
Regulatory issues

UK businesses may feel the impact of no longer being in a free trade area with some of its biggest trading partners. Tariffs, quotas and import/export duties could be imposed for the first time in decades, limiting access to the UK’s closest neighbours. This could have a major impact on the economic viability of the trading of goods and services and may also introduce logistical problems, as the negotiation of borders, paperwork and regulations could make the transporting of goods more time-consuming and costly. UK companies currently benefiting from EU passports may need to relocate some or all of their business in an EU country and may need to rethink their tax status.

What changes might we see?
The degree of UK flexibility on regulations will be part of overall negotiations between the EU and the UK. Exposure of UK companies to the EU single market will doubtless be at a price, and the real haggling will be over which regulations continue to bind UK companies. There is a window of opportunity for business to lobby the government to amend laws such as those governing public procurement, financial services regulation, employment and the environment.

Next steps:
• Does the business have a regulatory approval in an EU state which allows it to operate in other countries? If yes, then establish:
  – in which EU country the regulatory approval was obtained
  – in which other countries it operates on the basis of this regulatory passport
  – what the regulatory approval covers
  – whether the regulatory approval or the passport activities are affected by Brexit
  – how important the regulatory approval and the passport activities are to the business and, therefore whether action should be taken.

• If goods or services are supplied by the business from the UK to other EU countries, are they subject to EU regulatory requirements? If yes, then:
  – what are those requirements?
  – what is their impact on the goods or services supplied by the business?
  – how are those regulatory requirements imposed, is it by EU Regulation or Decision, or by EU Directive that has been implemented into national laws?
  – in which countries does the regulatory requirement arise and does it differ between them?

• After Brexit there may be a difference between the regulatory requirements applied in the UK and in other EU countries. The business might prefer to supply all goods or services to comply with the EU regulatory requirements, or it might prefer or need to operate in the UK to the UK standards. The business should consider:
  – how important to the business those requirements are?
  – what if any action should be taken?

For sector specific updates and further insights see www.out-law.com/brexit
Assessing your contracts

Contracts may be affected in a number of ways. Any contract which specifically references the EU as the territory governed by the contract may lack clarity. Contracts should therefore be reviewed to ensure that you have protected against leaving them open to interpretation.

You must ensure that any new contracts are worded to give clarity over the next few years, and with regards to any trade negotiations, as well as considering the current free movement of goods and services principles within the EU, which impacts current pricing and the speed with which physical products can be delivered.

Next steps:
• Identify the key contracts for the business, as well as any key contracts in progress, review them to check if Brexit will have an adverse effect on them. What steps can be taken to protect the business?
• Do any contracts need to be put into place in order to protect the business?
• Confirm all commercial contracts exist in writing and review their key terms. Assessment of contracts should include:
  – territorial definitions
  – substance of the contract (eg. ability to buy or supply goods or services) and whether they depend on the import of goods or services to fulfil the contract
  – if the contract allows prices to vary to reflect the imposition of trade tariffs or restricts from where your goods and services acquired to perform the contract can be procured
  – what termination or contract variation mechanisms exist in the contract
  – how important the contract is to the business
  – change in law provisions
  – what the financial terms provisions say about currency and currency risks.

You must ensure that any new contracts are worded to give clarity over the next few years, and with regards to any trade negotiations.
The protection of virtually all IP rights has been harmonised across Europe, namely: patents, registered trade marks, designs, copyright and database rights. It is likely that the UK will repatriate most of this legislation to maintain the status quo and minimise the impact on business. So existing IP portfolios should not be adversely affected.

That said, the proposals for the introduction of a European unitary patent system mean that change is coming in this field whether Brexit takes place or not; the changes will however be different depending upon the referendum outcome.

Brexit will trigger changes to the processes of obtaining pan-EU registrations of designs and trade marks.

What changes might we see?
The unitary patent system could still be introduced in a maximum of 24 members states of the EU. However, it may no longer be attractive to the remaining member states and business. The UK is one of the top 3 jurisdictions in the EU where patents are filed. The reduced coverage of the unitary patent could make it harder to justify the filing and renewal fees proposed. So, efforts might be made to keep the UK in the fold.

If not, and assuming that sufficient member states participate (13 including France, Germany and Italy), then the London seat of the proposed new Unified Patent Court, which will focus mainly on Life Sciences cases, will most likely be lost. A new location will need to be agreed, which will likely add delay to the launch of the unitary patent system.

Protecting your intellectual property

The UK is one of the top 3 jurisdictions in the EU where patents are filed. The reduced coverage of the unitary patent could make it harder to justify the filing and renewal fees proposed.

For sector specific updates and further insights see www.out-law.com/brexit
Patents
Next steps:
• Review patent filing and commercialisation strategies in the light of new patent choices and forums for enforcement under the unitary patent system. The risk-benefit analysis of one choice over another may change in light of the referendum decision
• Ensure access to information on progress of renegotiations or implementation of concessions
• Put in place contingency plans around the different Brexit scenarios that take account of the varying permutations. Review and adjust these as more information becomes available
• Review and build flexibility into existing and future contractual arrangements to protect key contracts and consider how contracts may be affected by different referendum and renegotiation scenarios.

In relation to registered trade marks or trade mark applications that exist for the business:
• the territorial definition will be affected by Brexit
• the assumption is that the trade marks will be left covering 27 member states and that for the UK the trade marks or trade mark applications will be converted to a UK national trade mark/application
• assess whether and if so how and where the trade mark or trade mark application is being used by the business
• assess the importance of the trade mark or trade mark application to the business;
• assess whether it would be prudent to take additional steps to protect the trade mark, eg. by amending its scope or new territorial applications
• assess whether the trade mark application could be amended to address the potential effects of Brexit.

The same considerations apply in respect of Registered Designs.
Much of the UK’s company law is derived from EU legislation and the government would have to balance any deregulation against the importance of maintaining confidence in the UK as a country of choice in which to establish and operate companies. In some areas such as takeovers, the UK has gone beyond EU requirements in its domestic legislation in order to enhance investor confidence. It will not choose to damage confidence by making too many changes to that, and any new UK-specific rules are likely to replicate the existing EU regulation.

What changes might we see?
The UK government has driven much of the regulation that is in place and is unlikely to want to make substantial changes. The government would not risk, for example, damaging the status of the London Stock Exchange as a major international listing market and trading platform. We can assume that the UK will maintain international standards equivalent to existing EU directives.

Two areas where problems may arise are investment prospectuses and investment funds. There may be some complexity in prospectuses and announcement requirements if the UK loses the rights of mutual recognition between states. It will be up to the Commission to decide whether the UK’s law and practice is sufficient to satisfy its equivalence test to approve UK prospectuses.

Under the Alternative Investment Fund Managers Directive, non-EU funds and fund managers are treated differently to those in the EU. This would lead to most new funds being established in EU jurisdictions rather than the UK, to make marketing to EU investors more straightforward. Funds that are already established and no longer being marketed will feel less impact. However, new bilateral agreements between the UK and other member states, particularly in terms of taxation, will mean that existing structures have to be revisited.
On Brexit, the EU Insolvency Regulation will cease to apply in the UK. Unless and until alternative arrangements are made with member states, insolvency proceedings in the UK for companies operating across the EU will be in a state of uncertainty. The EU Insolvency Regulation ensures recognition of UK insolvency proceedings across the EU and without it office holders in the UK could find themselves dealing with competing proceedings across the EU. Whilst UK officeholders lose this benefit, their EU counterparts would retain many of the benefits of recognition by virtue of the UK’s implementation of the UNCITRAL Model Law on insolvency (to which only Greece, Poland, Romania and Slovenia are other member state signatories). Such uncertainty and loss of control for UK officeholders may lead to a loss of appetite for investors and funders to UK companies operating across the EU or see them look to invest/fund outside of the UK so less reliance is placed on the UK insolvency regime.

Next steps:
- What external funding does the business currently have available or use? Consider:
  - are there any funding or loan conditions that may be affected by Brexit? Considering in particular the possible adverse impact of currency movements, interest rate movements, threats to enforceability of commercial contracts, threats to supplying or procuring goods or services cross-border, potential imposition of tariffs?
  - what termination or variation mechanisms exist in the documentation?
  - what is the importance of the external funding to the business?
  - alternative means to obtain funding/investment in jurisdictions outside of the UK in case investor/funder appetite for UK bases lending is reduced
  - what if any action should be taken in relation to the external funding to protect the business?
- If new external funding is being procured, are there any Brexit-related contingencies or risks that need to be addressed in the documentation?
- Are there any currency related risks that need to be addressed?
- Interest rate related risks or contingencies
- Capital investments
- M&A or corporate transactions
- Is there a need to review prices or contract documentation relation to pricing in light of Brexit-related contingencies or risks?
- Is there a risk that being forced to trade on WTO terms may affect whether the business’s auditors can approve the accounts on a going concern basis?
- Does the business have sufficient flexibility in its multi-currency borrowing facilities to cater for changes in emphasis from trending in Euros to trading in other currencies?
- Does the company have substantial investor interest from the EU which calls for regular dialogue in those countries as securities issues in those countries?
- Does the company have cross border securities-based incentive schemes which may be affected by Brexit?

Unless and until alternative arrangements are made with member states, insolvency proceedings in the UK for companies operating across the EU will be in a state of uncertainty.
Tax

If Brexit arrangements mean that the UK remains within the European Economic Area (EEA) or European Free Trade Area (EFTA) it will continue to be bound by existing EU directives and so Brexit will not have substantial tax implications.

Even if the UK operates outside of the EEA or EFTA, a UK exit will probably not have major implications for direct taxes, which, subject to not discriminating against EU nationals and complying with the fundamental freedoms in EU law, such as freedom of establishment, are based on domestic, rather than EU law.

Leaving the EU would mean that the UK would no longer be obliged to maintain a system of VAT, but abolition of VAT is unlikely due to the significant revenues it raises.

What changes might we see?

An emergency budget will probably be needed to set out the changes the government proposes to make to UK tax law.

Although, whatever the Brexit arrangements, our VAT system is likely to continue, broadly on current EU principles, we could see changes to exemptions and zero rating. There could therefore be an opportunity to lobby for exemptions and reliefs that would benefit UK business. The government will need to work out how supplies to those established in EU countries will be treated as this could impact on VAT recovery for financial services companies.

The UK could decide to give tax incentives to selected regions or sectors, if it no longer has to comply with EU state aid rules. However, the Treasury might be tempted to introduce a law abolishing historic EU-law based tax refund claims, which continue to prove costly.

Companies which are relying on the interest, royalty and parent/subsidiary EU directives to reduce their overseas tax bill could see an increase in overseas tax withholdings, if the UK no longer benefits from EU directives.

Next steps:

- Identify whether you are in the process of, or contemplating, making any tax repayment claims or other tax litigation based on EU law principles as we don’t yet know how ongoing claims could be affected

- Identify whether you have any operations outside the UK, where profit repatriation free of withholding tax depends upon an EU directive rather than the terms of a double tax treaty

- Consider whether possible VAT changes in relation to supplies to the EU could impact on your VAT recovery

- Consider how your business could be affected by customs duty changes in relation to EU imports and exports.

For sector specific updates and further insights see www.out-law.com/brexit
The EU has signed hundreds of international political agreements with other states and organisations, as well as so-called “mixed competence” agreements to which the UK is a signatory alongside the EU. These encompass the following main policy areas:

- Social and employment policies
- Regional policy
- Employment law
- Health & safety
- Climate change
- Tourism, industry and culture
- Energy and transport policies not related to the single market
- Justice and home affairs (although there could be intergovernmental bilateral agreements)
- Common defence and foreign policy.

**Intergovernmental agreements between the EU and third party institutions**

**Next steps:**

- Is the business especially affected by or subject to any intergovernmental agreements between the EU and third party institutions?

- If yes, would there be material risks, threats or opportunities for the business if the UK was not a signatory to any of those intergovernmental agreements?

- What if any action should be taken, if any?

**Countries with which the EU has signed free trade agreements or equivalent**

**Next steps:**

- Is the business especially affected by or subject to any free trade agreements or equivalent with third party states?

- If yes, would there be material risks, threats or opportunities for the business if the UK was not a signatory to any of those agreements?

- What action should be taken, if any?
UK businesses contracting for services from a non-UK business may not be able to receive them and may need to find alternative suppliers.

For sector specific updates and further insights see [www.out-law.com/brexit](http://www.out-law.com/brexit)

### Free trade agreements in force

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### Free trade agreements currently in negotiation:
- **India** Negotiations initiated in 2007 on EU-India Bilateral Trade and Investment Agreement are stalled as of March 2015
- **ASEAN countries** – now being pursued individually
- **Gulf Cooperation Council** (Bahrain, Kuwait, Oman, Qatar, Saudi Arabia, and United Arab Emirates)
- **Russia**
- **Mercosur** (Argentina, Brazil, Paraguay, Uruguay, and Venezuela)
- **Japan** (Japan–EU relations)
- **Transatlantic Trade and Investment Partnership** (TTIP) (United States–EU relations)
- **The Trade in Services Agreement** (TiSA) is a trade agreement currently being negotiated by 23 members of the World Trade Organisation (WTO), including the EU.
Implications of UK businesses trading on WTO terms

Trading on WTO terms with the EU or third party states would mean:

- UK businesses currently supplying services from the UK into those countries, or supplying services in those countries, may find that they are not entitled to do so in the future
- UK businesses contracting for services from a non-UK business may not be able to receive them and may need to find alternative suppliers
- UK businesses supplying goods from the UK into those countries may find that such exports will become subject to customs formalities and tariffs or, in a worst case scenario, may be prohibited
- UK business purchasing goods from a non-UK supplier may not be able to procure them or may find that such exports will become subject to customs formalities and tariffs or, in a worst case scenario, may be prohibited, and may need to find alternative suppliers.

Trading on WTO terms would mean that the UK would set a single set of tariffs, with specified tariffs for different product categories, which would apply to imports of goods into the UK, regardless of the goods’ country of origin. It would not be possible, for example, to set low tariffs on imports from EU states into the UK, and to set higher tariffs on imports from other countries; the UK would have to adopt a single set of import tariffs.

In turn, the countries to which the UK exported goods would not be able to offer preferential import tariffs to UK businesses.

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