BREXIT: RESPONDING TO THE LEAVE DECISION.

OUR AT A GLANCE SECTOR GUIDE.

GOWLING WLG

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ABOUT GOWLING WLG

Gowling WLG is an international law firm created by the combination of Gowlings, a leading Canadian law firm, and Wragge Lawrence Graham & Co (WLG), a leading UK-based international law firm.

With more than 1,400 legal professionals in 18 cities worldwide, we provide our clients with in-depth expertise in key global sectors and a suite of legal services at home and abroad. We see the world through our clients' eyes, and collaborate across countries, offices, service areas and sectors to help them succeed, no matter how challenging the circumstances. Learn more at gowlingwlg.com.

Gowling WLG is an international law firm built on the belief that the best way to serve you is to be in tune with your world, aligned with your opportunity and ambitious for your success. We recognise that in this uncertain world, it's essential to be proactive and informative, so we've taken the bold step of sharing some of the thinking and issues that we have been seeing in various disciplines and sectors since the Brexit vote. None of the below is guaranteed and no warranty is given that any forecasting will be accurate - even Robert Peston is being circumspect! However, we thought you might just find our sector round up interesting and thought provoking.

Our Brexit Unit are experts (who're highlighted below) who act as points of contact for our clients on all Brexit-related matters.

AUTOMOTIVE

Greg Standing & Derek Southall

Maintaining access to the single market is critical for the UK auto industry, with 80% of cars exported, and 50% of those into Europe. If we do remain in the single market, we will continue to be subject to EU regulation without the chance to influence it.

There may be a reduction in investment by global manufacturers as such investment is based on the UK's access to EU markets and its active and influential membership of the EU. Outside the single market, domestic legislation affecting the sector is unlikely to change significantly as we helped craft much of it at EU level and it will remain fit for purpose. However, there is a long-term risk of divergence in standards between UK and EU manufacturing. Output is likely to be up, but domestic sales may be affected by any economic downturn and there is a medium/longer term risk of manufacturers relocating production overseas. Exchange rate fluctuations can affect cross-border deals and the supply chain. However, the weak pound will benefit exports although imported cars will become more expensive. In the longer term, trade deals with non-EU countries may be an opportunity to increase the sale of cars, built in the UK, into markets that UK-based manufacturers have struggled to sell into in the past such as China, India, the US, and Australia.

AVIATION, AEROSPACE AND DEFENCE

Clark Sargent

The UK's defence budget may be reduced but the recent vote to replace Trident, the retention of Michael Fallon as Defence Minister, and the UK's continuing commitment to NATO will act as stabilising factors.

The commitment to defence spending, under a Conservative government, seems unlikely to change (at least in the short term). The UK's continued access to the Common Aviation Area will depend on the outcome of negotiations with the EU or alternative measures, such as the UK re-joining the European Common Aviation Area which incorporates the CAA. UK aviation regulation is primarily derived from EU law but is unlikely to change if the UK wishes to retain access to the EU aviation market. UK owned airlines with EU carrier status can operate anywhere within the EU. If the UK is unable to secure equivalent rights upon Brexit, UK based airlines could be forced to relocate in order to retain access to the EU market.

BANKING

Kirsty Barnes & Chris Brierley

There are no immediate concerns around liquidity in the banking market – banks are more financially resilient (with greater liquid assets and capital) than in 2007/2008. Furthermore, the Bank of England has pledged an injection of £250bn to ensure the continued functioning of the market.

BoE interest rates remained unchanged in July but a cut in the coming months is predicted. Facility documentation may now include Brexit-related default clauses but it is too early to claim these clauses will become the norm (in addition to the usual 'material adverse change' clauses). If the facility is multi-currency, businesses should review the terms for any potential currency exchange risk costs. Ratings downgrades can affect either lenders or borrowers – if a lender has been downgraded, businesses should check potential thresholds that trigger the need to replace a lender or move deposits to comply with covenant requirements. A downgrade of a rated bond issuer could trigger a call on capital or a price change. Borrowers should be alive to any decrease in secured asset values as this could trigger a breach of any loan-to-value covenants.

COMMERCIAL CONTRACTS

David Lowe

English contract law has been around for hundreds of years and is substantially unaffected by Brexit. Immediate issues that are arising include currency/currency risk, rights to terminate for changed circumstances and insolvency risk caused by economic uncertainty.

For existing contracts, Brexit is unlikely to be a reason to terminate, a frustration event or a force majeure issue, though some contracts may expressly make allowance for material adverse change or change of law. Appointments – e.g. as exclusive EU distributor – need to be reassessed for meaning and as Brexit approaches EU regulated areas such as product safety, consumer law and commercial agents will also need to be assessed. Contracts to be signed need to be future proofed against the possibilities for change.

COMPETITION LAW

Bernardine Adkins

In the short term, competition law will remain alive and kicking in both the UK and the EU. Longer term, EU competition law will still apply to UK businesses in a post-Brexit world where an agreement or conduct produces an effect in the EU.

The Commission will still have enforcement powers against UK firms, just as it has against any third country. UK business will still be subject to the EU Merger Regulation, and also, if we come out of the Single Market, will be subject to parallel UK merger control. We may repeal section 60 of the Competition Act requiring courts and the CMA in the UK to apply its competition rules in exactly the same way as the EU does. But it is likely that the CMA and the courts would still have regard to EU practice when applying UK law. We may also increase the emphasis in UK competition law on pursuing individuals rather than just firms who break the competition rules. EU competition law, for its part, unshackled from liberal Anglo-Saxon thinking of British Commission officials in DG Comp and judges, may over time become less economic orientated and more rule-based.

CORPORATE

Sunil Kakkad

M&A activity is likely to slow down as parties, including funders, assess the impact of the vote to leave, the uncertainty around the immediate future and the markets' reaction.

The Companies Act 2006, and the secondary legislation made under it, is unlikely to change aside from the removal of any burdens on businesses which the government feels are unnecessary following a Brexit. The existing capital markets regime is also unlikely to change. Significant change to the UK Takeover Code is unlikely as the EU directive on which it is based was itself derived from an earlier version of the UK Code. Regulation of domestic M&A transactions is not based on EU law and so will not change. Cross-border mergers between UK companies and those from other EEA states are currently facilitated by an EU framework. The continuing availability of this will depend on the UK's future relationship with the EU.

DATA PROTECTION

Peter Hall

Prior to the referendum, EU countries (including the UK) were preparing to give effect to the wide-ranging General Data Protection Regulation (GDPR) in 2018.

First, it is unlikely that we will have exited the EU before the GDPR takes effect in the UK. Second, if we want to be considered post-Brexit as a country with adequate levels of data protection to use, share and transfer data across borders, then we are likely to want to be GDPR-compliant in any event. In short, we are likely to give effect to the GDPR in detail or in principle whether we Brexit or not.

DISPUTES

Tom Price

Rules on governing law are unaffected as they are governed by international not EU treaty. EU principles and rules on jurisdiction, service and enforcement may be affected. However, there is a common interest in a collective approach to these issues between the UK and the rest of the EU.

It is therefore to be hoped that any deal will retain most if not all of the recognition and reciprocity that currently exists (that assists both EU and UK companies). Arbitration may become more popular for higher value contracts between the UK and Europe. The use of local service agents in contracts may increase (and indeed is recommended) to ensure certainty of service of proceedings.

EMPLOYMENT
Jonathan Chamberlain

Whilst much of British employment law derives from Europe, there is much that is UK based. In addition, the UK led the way on many of the EU initiatives e.g. discrimination laws.

David Davis, the new Minister for Brexit, has already said he has no intention of diminishing workers' rights. However, Brexit flexibility may put some areas under the spotlight. The Working Time Directive and family friendly EU measures such as parental leave could be scaled back and EU agency worker rules a target for revocation. TUPE may become more employer friendly, especially around harmonisation on employment terms and collective redundancies. Discrimination laws are likely sacrosanct, though compensation caps could be considered and positive discrimination allowed for under-represented groups. Finally, collective redundancy consultation rights might be tweaked although the process is very unlikely to be removed.

ENERGY
Derek Goodban

A substantial amount of domestic energy law is derived from the EU, creating a potential for significant change in legislation and policy depending on our ongoing relationship with the EU. However, focus on the energy 'trilemma' is unlikely to change: maintaining affordability, ensuring security of supply, and reducing carbon emissions (although we may no longer be bound by EU carbon targets). Security of supply will be affected by any severing of interconnection with Europe and current policies to bring on-stream more gas and/or encourage storage will continue or may be accelerated to mitigate this risk. However, short term impacts are most likely to be felt by developers of new generation projects with uncertainty around Brexit priced into project costs and financing.

EU/UK POST-BREXIT TRADING RELATIONSHIP

Bernardine Adkins

Irrespective of what model is agreed, a transitional agreement is likely to be put into place, to respect certain acquired rights and to avoid a nasty shock to the UK, EU and global economy. This may include a transitional period in the EEA, before moving to a bespoke bi-lateral arrangement with the EU. Long term, the softest Brexit would be for the UK to remain in the Single Market.

There is increasing scepticism as to the 'fitness for purpose' of the EEA arrangement, however, which was set up as a conduit to ultimate EU membership, and not as a means of exit. Norway may also baulk at such a large economy muscling into its arrangement and unsettling its long-established dynamic. Long term, UK/EU relations may be governed by a (or a series of) bi-lateral agreements, with limited access to the Single Market (such as Switzerland and Canada (agreement not yet ratified)). This may take some years to negotiate. Of key concern would be to enable access of UK financial services to the Single Market (single passport).

The worst case scenario is that no deal is possible – and the UK would have to apply to re-join the WTO as a single state. In that event, the Common Commercial Tariff would apply to UK products imported into the EU. An interesting spot to watch will be the trading agreements with third countries that the UK will put into place now that it will be free of the EU – what does it have to offer, and will third countries be prepared to grant the same concessions to the UK as to the EU, given the greater leverage that the EU wields by providing access to 500 million consumers (pre-Brexit)

HEALTH AND SAFETY AND ENVIRONMENT

Andrew Litchfield

UK health and safety and environment legislation pre-existed our membership of the EU. It has been influenced by Europe since, but remains on the whole, domestic law and therefore unaffected by Brexit. It works.

Our record is strong and helps to make makes business efficient and productive. We do not therefore see that it will be a government priority to make sweeping changes. There may be opportunities to make the system more specifically aligned to the UK economy, but this will only be a continuation of recent attempts to cut red tape.

HEALTH AND SOCIAL CARE

Robert Breedon

The vote to leave comes at a time when the UK's health and care system is already facing huge operational and financial pressures. Vote Leave's promise of £100m per week additional funding for the NHS has been quickly disavowed.

In the face of predicted economic instability and uncertainty, any public spending cuts may see the NHS lose its 'ring-fenced' status with significant implications for a service already struggling to live within its existing budget. Greater controls on eligibility, changing care models and challenging funding arrangements could prevail. The other big issue is workforce – 55,000 staff in the NHS and an estimated 80,000 staff in the social care sector are from the EU. Given low retention rates leading to current shortfalls in both the health and social care sectors – and the unlikely prospect of a relaxation of immigration controls for non-EU nationals – the government must clarify its intentions on the ability of EU nationals to work in health and social care roles in the UK, not least to avoid current EU staff deciding to leave to work in other countries.

INFRASTRUCTURE

Stephen Kenny

The political uncertainty is causing delay to some projects, particularly nationally significant projects, but it does seem that others such as HS2 will still proceed.

Several economic commentators believe that if the austerity programme is eased it will allow for infrastructure investment in the medium term with interest rates in the UK/Europe at all-time lows. There is some evidence that property investment funds are looking at broadening into infrastructure investment (PPPs etc.). Sterling weakness will help overseas investors seeking infrastructure assets through secondary market purchases. The UK is a shareholder in the European Investment Bank (a key co-funder on significant UK infrastructure projects, e.g. Thames Tideway). While it is unlikely that the UK will remain a member of EIB, the EIB will continue to invest in the UK (although probably at a reduced level). Overall, despite the immediate market impact, the fundamentals of the UK economy remain strong and infrastructure remains an attractive asset class offering resilient long-term investment.

INTELLECTUAL PROPERTY

Gordon Harris

The current systems for filing patents in the UK and Europe and copyrights and database rights will be largely unaffected by Brexit as they are covered by non-EU international treaties.

The initiative to create the unitary EU patent is likely to be delayed while the impact of Brexit is assessed, although there is still a strong political will to make it work. The UK still remains a quick, thorough and experienced jurisdiction for handling patent claims. National trademark rights are unaffected but existing Community-wide trademarks are likely to be split to create UK and rest of EU rights. For new trademarks and registered designs, national filings in the UK as well as in Europe are to be recommended as a safeguard against how Community wide rights might be handled post-Brexit. Agreements will need to be future-proofed to reflect the different rights in the different territories. EU digital rights enforcement systems are likely to survive in UK law.

LIFE SCIENCES

Pat Duxbury

UK life sciences companies and scientific researchers benefit from various EU funding schemes. Such funding will need to be replaced to maintain the UK's position as an R&D centre.

Most of the UK's legal framework governing medicines and medical devices are based on, or directly apply, EU legislation. Businesses are worried about the regulatory environment. Given the cross-border nature of the sector, UK regulation is unlikely to diverge significantly from that of the EU, although it is likely that there will be an increase in regulation conducted at the domestic level. There is also a worry that complex supply chains in the sector will be impacted in the advent of any trade barriers and tariffs. Any changes to the IP regime will be of particular significance to the sector. No matter what deal is done with the EU, it seems inevitable that the European Medicines Agency will be relocated out of London.

PENSIONS

Glyn Ryland & Ian Chapman-Curry

Brexit will not result in any significant change to the UK pensions legal framework. However, the financial volatility caused by the resulting uncertainty has increased scheme investment risk. In addition, falling gilt yields have had a negative impact on scheme funding.

Trustees may also become concerned about the impact of Brexit on the strength of the employer covenant and seek safeguarding strategies around investment and risk management. Practical next steps for trustees include focusing on integrated risk management as a way of understanding and managing risks and discussing issues with professional advisors. In addition, schemes that use derivatives or swaps should check the terms of those agreements, especially around counterparty rating downgrades / termination triggers and calls on collateral.

PUBLIC LAW & REGULATION

John Cooper & Kieran Laird

Currently EU law forms part of the UK's domestic legal framework and primary legislation that fails to comply with it can be disapplied. The UK courts also apply EU legal principles (such as proportionality and legal certainty) when considering EU law.

The future constitutional position of EU law and how our courts apply it will depend on the ongoing relationship that the UK has with the EU. The potential scope for change in each regulated sector will partly depend on the degree to which it is currently shaped by EU law – some, like food and drink, telecoms and medicines are heavily dependent on EU law whereas others, such as the economic regulation of water, are only minimally affected. Ongoing compliance with EU regulation may also be necessary in some sectors for trade into the EU. Where regulatory models adopted at EU level are based upon models that were already in existence in the UK, there may be little change in the structure of regulation but increasing differences in regulatory objectives and policy.

PUBLIC SECTOR AND OUTSOURCING

Sarah Sasse

The key rules on procurement are found in EU Directives which have been transposed into EU law. However, the UK had a procurement regime before joining the EU and has gone further than the EU in domestic procurement rules. In addition, whatever the nature of the UK's ongoing relationship with the EU, it is likely that procurement regulation will be required.

Greater change in the public sector may come through the withdrawal of EU grant funding which has been used to stimulate growth and regeneration in areas that would not otherwise be feasible. A Brexit is also likely to impact the availability of finance from the European Investment Bank which has previously contributed to the funding of many large infrastructure projects in the UK.

REAL ESTATE

Richard Bate

Brexit will have almost no impact on core land law in England and Wales. EU based regulation and domestic law that impacts on the real estate sector is unlikely materially to change in the short/medium term. However, some relaxation of environmental regulation and changes to VAT are possibilities.

In the market, low sterling value is generating interest in top assets amongst international buyers. Finance availability has been affected for some asset classes where valuers are reluctant to commit to valuations in volatile markets conditions and faced with future uncertainty. Retail property funds are controlling redemptions but asset sales will progress. It remains to be seen who will buy the assets and how that may impact on values. Nonetheless, despite current uncertainty and volatility, UK property is likely to remain part of a diversified investor's portfolio in the long term. Public sector led regeneration and infrastructure projects will continue but controls on free movement of labour may impact the construction industry in the long term and consequently the rate of supply of new development generally.

TAX

Lee Nuttall

In tax matters, Parliament is sovereign and there are no immediate tax changes caused by Brexit. We will hear from the Chancellor next in the Autumn statement – likely to contain stimulus measures to counteract uncertainty and economic slowdown.

Progress with anti-avoidance, the business tax roadmap and tax competitiveness will continue. Independent of the EU, the UK remains committed to implement the OECD's Base Erosion and Profit Sharing recommendations (BEPS), including controversial rules on corporate interest deductibility. VAT is unlikely to change – it is now part and parcel of business and makes too much revenue. Measures to protect the City and the UK's attractiveness to business will be needed and double tax and withholding tax arrangements will need review especially for UK holding companies. Customs & Excise will not change in the short term but bi-lateral trade agreements will need to be renegotiated. The UK may become more protectionist on excise duties but risks tit-for-tat measures and extra export red tape.

TECH

Alexandra Brodie

Deal activity in the sector seems to be proceeding as normal, save for a slight pause or slowing of interest on the ECM side. There is also little change in volumes of tech litigation. However, corporate, sponsor, financial institution and non-bank financial institution clients and contacts report an increase in caution.

Those areas of business which are particularly sensitive to EU regulation are not currently faltering, but there is awareness that products traded into the EU will need to comply with EU regulations and that the UK will have less scope to influence the content of those frameworks. Tech/property businesses such as data centre operators are reporting a surge in interest from Asia-based customers, and new interest from 'classic' real estate businesses looking to diversify into tech/property given the continued and increasing need for data centres and cloud providers.

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