February 2017

Brexit – what next for UK businesses?

This briefing provides an overview of the latest news and views on Brexit, and looks at the legal risks for UK businesses, giving some insight into the prospects for M&A and the public markets, and issues which should be factored into contingency planning over the coming months.

Parliamentary process and timing

The short Bill approving the exercise of Article 50 of the Treaty on European Union, which initiates the exit process, having been approved on second reading by the House of Commons, is now being considered by a Commons Committee before it goes to the House of Lords. Most commentators think it unlikely that the House of Lords, as an unelected Chamber, would seek to block the Bill outright in defiance of the referendum result, but opponents may nonetheless attempt to introduce delay or to secure additional commitments from the Government on matters such as the UK's negotiating objectives and further Parliamentary involvement in the Brexit process (notwithstanding the Government's recent commitment to give Parliament a vote on the eventual exit deal).

The Government, meanwhile, insists its Brexit timetable is unaffected by the outcome of the Miller case (see **The Article 50 case and other legal challenges** below), and is expecting the Article 50 Bill to be approved by both Houses shortly, to pave the way for the exercise of the Article 50 notification in March. The Bill is deliberately short and the Parliamentary process expedited, to curtail scope for debate and amendment.

Assuming the Bill gets through Parliament, the Government will then give formal notice, under Article 50, of the UK's intention to leave the EU. Article 50 only allows 2 years for agreement to be reached on exit terms, which many commentators believe is unlikely to be sufficient to resolve all the issues over the UK's future relationship with the EU, including highly sensitive matters such as the level of the UK's "divorce payment" to the EU and the status of Gibraltar and Northern Ireland.

Importantly, though, Theresa May has now acknowledged the need for an "implementation phase" following Brexit day (transitional arrangements by another name) which will be key to ensuring an orderly, managed exit. Any such transitional arrangements would potentially allow additional time for a free trade agreement to be negotiated, but may be subject to a "sunset" clause, automatically ceasing to apply within a certain period, to allay the fears of ardent leavers that transitional arrangements may become permanent.

A "clean"Brexit?

The Government's recent White Paper confirms the "clean Brexit" principles on which the Government's negotiating strategy will be based, as previously outlined in the Prime Minister's Lancaster House speech, namely:

- full exit from the EU (no partial or associate membership);
- exit from the Single Market for goods and services (which effectively rules out the "soft" Brexit options involving EEA membership);
- exit from the EU Customs Union;
- an end to the jurisdiction of the European Court of Justice over UK matters;
- full control of UK immigration policy; and
- contributions to the EU budget only for specific projects.

The intention is that the eventual future trading relationship with the EU will be based on:

- a comprehensive free trade agreement with the EU which will, as far as possible, continue tariff-free trade with the EU and provide access to (rather than membership of) the Single Market; and
- some form of customs agreement which will aim to minimise border red tape for trade in goods with the EU but enable the UK freely to negotiate trade deals with third countries.

Prospects for new trading relationships

There are positive signs from the US and other third countries that bilateral trade deals with the UK will be on offer. A UK-US trade deal in particular could provide major new growth opportunities for UK businesses and it may be possible to accelerate the negotiation process by "borrowing" aspects of the EU-US TTIP agreement, which appears to have stalled.

However, the 2-year timetable following the Article 50 notification to negotiate (i) the UK's exit arrangements and (ii) a new trading relationship with the remaining EU27 still looks extremely ambitious. Whilst the UK Government's wish list is now clearer, it will take some time before the shape of the UK's future trading relationships becomes clear.

With elections in Germany, France, the Netherlands and possibly Italy this year, the UK may struggle to make headway with EU negotiations whilst the attention of key players is elsewhere.

Recent experience also shows that wide-ranging trade agreements typically take years to conclude because they are complex and politically sensitive. The 2-year period is in practice much shorter than that, given the need to allow time for an approval process. The European Commission has made clear that if notice is given under Article 50 in March, it expects negotiations to be concluded by October 2018, so as to leave 4-5 months for approval of the draft deal by the EU Council of Ministers and the UK and the European Parliaments.

This is a very tight timetable given the number and complexity of issues that need to be dealt with.

No deal preferable to a bad deal?

Theresa May clearly stated that no deal would be preferable to a poor deal for the UK, which raises the stakes for the negotiations and the promised Parliamentary vote on the final deal (including any transitional arrangements).

Once the final deal is on the table, Parliament will be faced with the unenviable decision to either approve it, or reject it and precipitate a "hard" Brexit, and by this we mean exit from the EU, the Single Market and Customs Union *without* a preferential UK/EU free trade agreement on goods and services in place, forcing the UK to fall back on its membership of the WTO.

For many in the business community, this is not an appealing prospect. The cost of a hard Brexit to the financial community alone (assuming the UK has third country status with no regulatory equivalence) has been estimated at £18-20bn, with the loss of 31-35,000 jobs and a fall in tax revenues of £3-5bn pa[1].

Issues with the WTO option

The UK's continued membership of the WTO should be unaffected by Brexit. However, the terms of its membership (schedules of tariff commitments etc.), currently predicated on being part of the EU, would require renegotiation and agreement among the other 163 WTO members. This may prove challenging and time-consuming.

Pending agreement with the other WTO members, including the EU bloc, on the UK's new schedules of commitments, a realistic outcome is that the UK maintains its existing WTO EU trade schedules, but copying across the EU's commitments will not work for all products/services.

For example, the EU has agreed to allow imports of many agricultural products (such as beef) at a lower preferential tariff rate only up to the level of an EU-wide quota (beyond which a much higher standard tariff applies – in many cases effectively making it uneconomic to import). Clearly, measures such as quotas will have to be divided up between the UK and the EU, which will be sensitive from a domestic as well as international perspective. Agreement with the EU is needed on these issues before a UK-specific set of commitments can be presented to the WTO.

In terms of trade with the EU, WTO rules also mean significant tariffs on certain categories of goods (such as 10% on cars and 20%+ on many food products) which will make UK exports more expensive and increase the cost of imports from the EU.

More generally, WTO rules also provide for a significantly lower level of market access than EU membership; in particular, some UK goods and services providers may face significant "behind the border" barriers to trade such as regulatory or technical requirements which may be more difficult to meet for non-EU businesses.

Cliff edge risks

The UK will also face a number of "cliff edge" risks if it leaves the EU without reaching agreement with the remaining Member States on future trade and transitional arrangements, thereby resulting in an abrupt, disorderly Brexit. Examples of cliff edge risks include:

- **Disruption to goods trade**: the reintroduction of customs controls may lead to delays at major ports (both in the UK and on the continent), especially those handling HGV traffic. This is a particular concern for perishable goods and distribution systems reliant on "just in time" delivery. These are not insoluble problems but will require time and additional resources for new infrastructure to be put in place, together with agreement with EU partners on customs cooperation and mutual recognition of e.g. product testing/certification.

[1] Oliver Wyman: The impact of the UK's exit from the EU in the UK-based financial services sector (2016)

- **Disruption to services contracts and financial markets**: certain contracts may become illegal to perform, such as contracts dependent on financial services passports, potentially disrupting financial markets. Financial services firms may well be able to ensure continuity by, for example, moving business units to the remaining EU member states and/or obtaining any required regulatory authorisations in such jurisdictions, but such changes would need to be planned some time in advance (which may prompt some firms to decide that they cannot afford to await the outcome of Brexit negotiations).

- **Disruption to export licensing and sanction regimes:** for example, export licenses are currently required for military goods and "dual-use"[2] products emanating from non-EU countries. Affected companies will need to ensure that red tape does not impede their exports and that licenses can be obtained without undue delay, otherwise UK firms stand to lose business to EU competitors which can supply immediately. There may also be sanctions issues – for example, EU sanctions against Russia do not prohibit EU firms from dealing with EU subsidiaries of blacklisted Russian firms. After Brexit, UK firms (including financial institutions) may not be able to deal with such UK subsidiaries. More generally, the UK's approach to policy and mechanics of such trade control and sanction issues remains to be seen.

Hoping for the best, planning for the worst

Given the level of uncertainty, whilst we are hoping for the best outcome for the UK in the negotiations, our view is that UK businesses should plan for a hard Brexit scenario, as the downside risks of this are easier to predict - but as far as possible adopt a “wait and see” approach before actually implementing any such plans, so as to minimise disruption or expenditure that may prove to be unnecessary.

Some businesses may find that the risks of a “hard Brexit” are largely manageable and may even present opportunities. Others may conclude that they need to take some steps now to protect themselves against certain risks since, despite Theresa May's attempts to provide some certainty as to the direction of travel, it may be some time before the shape of our future trading relationships with the EU and other territories becomes clear.

At the end of this briefing you will find a checklist of actions you might consider taking during the period between now and the date on which the UK exits the EU.

The Article 50 case and other legal challenges

ARTICLE 50 CASE

As has been widely reported, the Supreme Court in the Miller case dismissed the Government's appeal against the judgment of the Divisional Court that both Houses of Parliament must approve the giving of notice to exit the EU under Article 50 of the Treaty on European Union, by means of an Act of Parliament.

The claimants, led by Gina Miller, a fund manager, successfully argued that the scope of the Government's Royal prerogative to conduct foreign policy does not extend to the withdrawal of individual rights under domestic law, which would be the inexorable result of the process begun by triggering Article 50.

The Supreme Court also ruled that, whilst the Sewel Convention (that consent of the devolved administrations is required for legislation which affects devolved matters) operates as an important political constraint on the activity of the UK Parliament, it has no legal force, and neither it, nor the devolution Acts give the devolved administrations in Scotland, Wales and Northern Ireland a right to veto the decision to withdraw from the EU.

[2] Dual-use products are essentially goods, software, technology, documents and diagrams which can be used for both civil and military applications.

Having lost its appeal, the Government acted swiftly to seek Parliament's approval to give notice under Article 50.

There are, however, further ongoing legal challenges which may have an impact on the Government's strategy.

OTHER LEGAL CHALLENGES

A lobby group called British Influence applied for judicial review of the decision to exit the EU on the basis that the UK does not automatically leave the EEA (and with it the Single Market) upon leaving the EU. Their action was swiftly dismissed by the High Court as being premature, leaving open the possibility that the action could be relaunched later in the process. If it were to succeed, it could make it easier to negotiate transitional arrangements to stay in the Single Market for a period – but it would leave the Government with a difficult political choice, given its stated desire to leave the Single Market.

In addition, Jolyon Maugham QC is bringing a crowdfunded action in the name of a group of MEPs claiming that notification under Article 50 is revocable. If this argument were to succeed, and if the UK/EU deal on offer proves not to be sufficiently attractive to the UK, it could decide to withdraw its notice of intention to leave the EU.

The revocation argument was not raised in the Miller case, but the outcome of this action is particularly significant given the ramifications of Parliament refusing to ratify the final deal agreed with the EU prior to Brexit day, and the Government's stance that no deal is better than a poor deal. As the revocability of Article 50 notification is a matter of EU law, the action is going through the Irish courts with a view to giving the European Court jurisdiction over this key issue, although it is unlikely to be decided for some time, certainly not before the Article 50 process is initiated.

The Great Repeal Bill – what will happen to UK law and regulation?

For over 40 years, EU law has been intertwined with UK law, in the form of EU Treaties, Regulations, Directives and decisions of the European Court (CJEU), and that body of EU law will remain intact until Brexit.

The content of Directives which have been enacted into UK law by Act of Parliament (such as large parts of the Companies Acts) will remain untouched by Brexit. By contrast, secondary legislation made under the ECA (European Communities Act) 1972 (such as the Working Time Regulations) would fall away, along with directly applicable EU law (such as the REACH Regulation on chemicals), instantly creating significant gaps in UK law and regulation upon Brexit.

The Government proposes to deal with this potential legal vacuum with its Great Repeal Bill, which will repeal the ECA, preserve secondary legislation made under the ECA, and incorporate into UK law all EU law not already implemented in UK statute, pending review of EU-derived laws which we may ultimately decide to keep, amend or repeal.

This approach does not work for all EU-derived law, however. Laws which are predicated on membership of the EU, or on reciprocity with other EU members, are not amenable to this treatment without modification, so will need to be identified and addressed separately and in some cases, in short order.

Moreover, the UK may be deprived of the administrative and technical resources of institutions linked to this legislation, such as the European Chemicals Agency (in the case of chemicals) or the European Medicines Agency (in the case of various medical products) and the European Commission. This expertise may need to be re-patriated to a national infrastructure going forward, requiring considerable time and resource allocation, and having the potential to increase the burden on industry (particularly those who also export to the EU and risk having to deal with any duality in regulation).

Our Brexit Working Groups are working through the body of laws applicable to business with a view to identifying those which are predicated on EU membership and require more urgent attention, and what needs to change to accommodate Brexit.

We do not anticipate a "bonfire of regulations", however, and many of the changes will be procedural, to make the legislation work as intended, rather than substantive.

Impact on debt and equity funding for your business and prospects for the M&A and IPO markets

EXISTING FINANCING ARRANGEMENTS

Some existing debt/equity funding arrangements in place for UK businesses will mature before Brexit actually occurs. Loan documentation typically has a life cycle of 5-7 years, however, so depending on the timetable for Brexit, some may not be repaid until after Brexit.

It is unlikely that many financing arrangements concluded prior to the referendum will have specifically contemplated Brexit and we have seen few attempts to introduce contractual Brexit-related rights and obligations in the months leading up to and following the referendum. In most cases we believe such rights to be unnecessary and potentially unenforceable given how difficult it is now to prescribe the circumstances of Brexit.

However, we are advising clients to make minor amendments to ensure debt documents envisage Brexit (e.g. tailoring references to the EU and to EU-derived legislation).

NEW FINANCING TRANSACTIONS

The availability of new finance may be impacted by economic uncertainty and financial market volatility, particularly around the time of exercise of Article 50 which may result in transactions being postponed or delayed (with lenders invoking "market MAC" clauses), or borrowing costs increasing. New debt documentation is likely to focus more closely on the likely consequences of Brexit, e.g. lenders introducing "bail-in clauses" (relevant assuming the UK ceases to be an EEA member) or "designated entity clauses" (allowing lenders to perform lending obligations in other jurisdictions through affiliates).

As Brexit approaches, existing deals will need to be checked and possibly amended to ensure that repeating representations, negative undertakings etc. will not trigger technical defaults.

THE IPO MARKET POST-REFERENDUM

Whilst the London equity markets have performed strongly following the initial shock of the referendum result, the volume and value of IPOs was down in 2016, being the slowest year for IPOs since 2012. Uncertainty created by the referendum and the US election led to a number of high profile listings being postponed or withdrawn.

Overall, there were 55 completed IPOs in 2016 compared to 62 in 2015 with 60% of the IPOs completing in the first half of the year. Many IPOs were priced at the bottom of anticipated ranges and, as a consequence, those companies that did list in 2016 have generally experienced positive share price performance post-IPO when compared to the wider market, providing better opportunities for PE houses to sell shares following the expiry of IPO lock-ups.

Whilst the outlook for the first half of 2017 continues to be cautious, an increase in activity is expected later in the year and it is important that companies seeking a listing are well prepared so that they are ready to launch a listing quickly when the IPO window re-opens.

In terms of the legal and regulatory regime for UK listings, much of the UK equity capital markets regime is derived from EU Regulations and Directives, and whilst there may be an opportunity for the UK to relax the rules post-Brexit to attract non-EU issuers and investors, e.g. to widen prospectus exemptions, the need for an ongoing relationship with EU investors and institutions is likely to limit scope for doing so, regardless of whether the UK achieves regulatory equivalence outside the Single Market or adopts some other model.

We would therefore expect the legal and regulatory environment for the IPO market to remain relatively stable.

Meanwhile, we expect to see Brexit risk factors in prospectuses, and Brexit risks noted in some annual reports.

THE M&A MARKET POST-REFERENDUM

THE MARKET SO FAR

Whilst the weakness of sterling has encouraged some overseas buyers into the UK market, it has struggled against the uncertain economic outlook since the referendum. For example, in terms of value, the UK buyout market was down 44% in 2016 to its lowest level since 2009 (£11.9bn compared with £21.2bn in 2015).

Deal volumes also suffered, although by a smaller margin (down 6% on 2015). The number of exits fell more sharply in 2016, down around 50% on the record levels set by 2015[3].

Markets and investors clearly dislike uncertainty so it is to be hoped that as more detail of the direction of travel towards Brexit emerges in the coming weeks and months, investors will be encouraged back into the market.

On the positive side, the continued availability of debt for acquisitions and re-financings (in part driven by the rise of credit funds) is cause for optimism for UK-based companies and investors seeking M&A opportunities.

DOMESTIC M&A – LEGAL FRAMEWORK

The legal and regulatory regime for domestic M&A involving private companies is little-influenced by EU law and is unlikely to change significantly post-Brexit. The rules facilitating cross-border M&A between EU entities (the Cross-Border Mergers Regulations) are derived from an EU Directive, but have so far been little used by UK companies and may be reviewed as part of the Great Repeal Bill process.

Interestingly, the Cross-Border Mergers regime has recently been used by a UK private company, Formenta Limited, for a restructuring prompted by Brexit. In a "reverse" cross-border merger, Formenta was absorbed by its Italian subsidiary, reportedly the first time the regime has been used in this way, which may prompt others to do the same.

In the public M&A sphere, the UK Takeover Code does give effect to the EU Takeovers Directive but much of the UK Takeover Code was in place prior to the Directive coming into force, and is widely accepted as a model for public takeover regulation, so is unlikely to change substantially post-Brexit.

BREXIT DUE DILIGENCE

Contingency planning for Brexit will be an important part of the DD process in M&A transactions in the coming months and years. The key Brexit-related issues for DD will include many of those mentioned in the contingency planning checklist at the end of this briefing, but in particular, should focus on the state of readiness of the target company in key areas likely to be affected by Brexit, including:

- **Geographic structure and potential for business interruption**: dependence on EU markets for customers or supplies and the strategic, financial and practical impact of customs controls on those trading relationships;
- **Passporting/licensing**: reliance on any EU passporting or licensing rights allowing supply across the EU from the UK (or vice versa);
- **Key contracts**: potential for termination as a result of MAC or similar conditions and impact on EU-wide contracts;
- **Staffing**: dependence on employees who are EU nationals and position of UK staff based in the EU, pending clarification of their immigration status; and
- **EU funding**: any reliance on, or benefit from, EU funding or other EU advantages.

[3] CMBOR UK Buy-outs Report Fourth Quarter 2016

BREXIT – ISSUES FOR M&A DOCUMENTATION

We also anticipate:

- possible attempts to negotiate MAC clauses to protect against general economic uncertainty and currency fluctuations. However, we have seen little evidence of this happening thus far, and given that a party to a transaction cannot rely on a MAC on the basis of circumstances known to it at the time of the transaction, such clauses may be difficult to enforce;
- increased concern about certain funds at the time of signing;
- where transactions involve EU-based parties or assets and enforceability of an English law judgment throughout the EU is important, issues arising over choice of law and jurisdiction for disputes relating to M&A documents, as a result of concerns over the effectiveness of a UK jurisdiction clause if English law judgments become less readily enforceable in the EU (for more on this, see the **Disputes** section of our checklist); and
- companies continuing to take advantage of sterling value-driven opportunities.

We would be happy to discuss with you the impact of Brexit on your business and your options for mitigating risks and making the most of opportunities presented by Brexit, both now in the future.

FOR FURTHER INFORMATION, PLEASE CONTACT

10 Snow Hill
London EC1A 2AL
T: +44 (0) 20 7295 3000
F: +44 (0) 20 7295 3500
www.traverssmith.com

Chris Hale
Senior Partner

E: chris.hale@traverssmith.com
T: +44 (0) 20 7295 3263

Will Yates
Partner, Private Equity

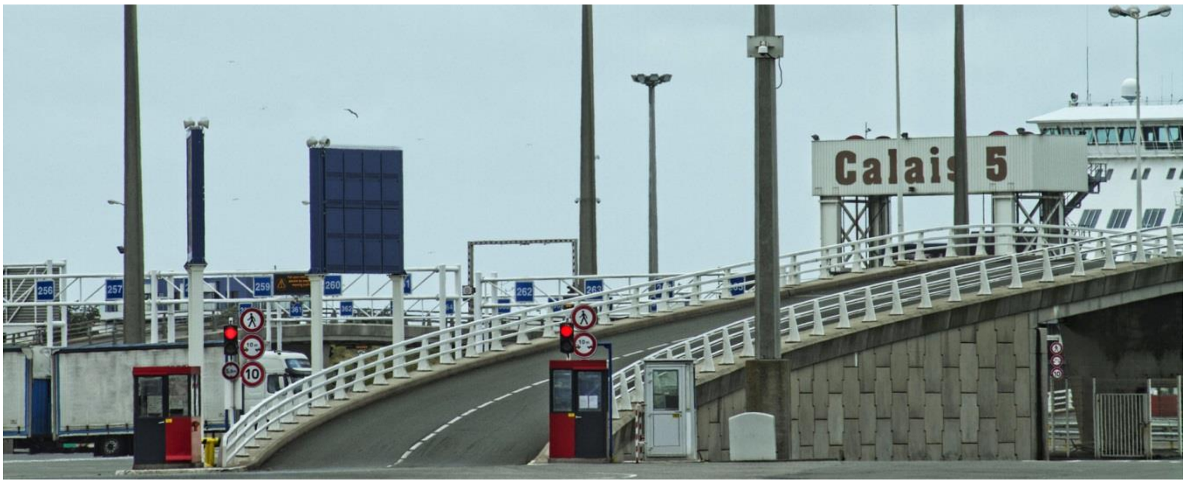
E: will.yates@traverssmith.com
T: +44 (0) 20 7295 3460

Paul Dolman
Head of Private Equity

E: paul.dolman@traverssmith.com
T: +44 (0) 20 7295 3274

Richard Brown
Partner, Commercial, IP and Technology

E: richard.brown@traverssmith.com
T: +44 (0) 20 7295 3254



February 2017

Brexit – checklist of issues for contingency planning

Below is a summary of the key legal issues which UK businesses should consider, and actions to be taken, in advance of "Brexit day" in March 2019, assuming the Government invokes Article 50 by the end of March 2017.

There is clearly still considerable uncertainty as to whether the Government will succeed in delivering the outcomes set out in the Government's recent White Paper and Theresa May's Lancaster House speech on 17 January 2017.

This list has therefore been prepared on the basis that companies should factor into their contingency planning the risk that the UK leaves the EU in March 2019 with no EU/UK trade deal or preferential access to the Single Market and potentially no agreement on transitional arrangements. Whilst ideally, businesses may prefer to await the outcome of negotiations with the EU, effective contingency planning on some issues may require a decision before that outcome is known.

Please refer to our full briefing for a more complete analysis of Brexit-related legal issues affecting UK-based businesses, including commentary on the Government's negotiating position, the likely timetable for Brexit, the Supreme Court ruling in the Article 50 case and other ongoing legal challenges and the prospects for the UK M&A and IPO markets.

Your suppliers: goods

Imposition of tariffs and customs controls on trade with the EU is likely to increase the cost of imports. Introduction of customs controls could also disrupt trade flows, particularly for HGV traffic via the Channel ports and for businesses reliant on "just in time" distribution (which typically have limited storage capacity). Consider the following:

- Does your business rely on supplies of goods originating in the EU or in countries with which the EU has a Free Trade Agreement (which may cease to apply on Brexit)? If you rely on suppliers based in the UK, such as wholesalers, do you know how far they are reliant on products sourced from the EU?

- Do you know what tariffs will apply to those goods if trade with the EU is based on WTO rules only or the relevant EU FTA ceases to apply? Could you pass on or absorb the increased price or do you need to explore alternative sources of supply (potentially involving sourcing of goods from within the UK or from outside the EU)?

- How would your business be affected if there is disruption to e.g. HGV traffic through the Channel ports? In particular, do you rely on just-in-time distribution? Consider what can realistically be done to mitigate the effects of disruption e.g.

  - exploring alternative sources of supply either from within the UK or from outside the EU;

  - increasing UK storage capacity to accommodate a "reserve stock" which could be drawn upon if just-in-time deliveries are seriously disrupted; and/or

  - ensuring that your wholesaler or logistics provider has adequate contingency plans in place.

See also under "**Commercial contract issues**", "**Export controls and sanctions**" and "**Environmental, social and corporate governance**" below.

Your suppliers: services

- Does your business rely on services supplied from the EU or from another country with which the EU has an FTA? If so, will Brexit have any impact on that supply? For example:

  - if EU-UK trade is based on WTO rules only with no agreement to maintain current EU passporting arrangements, financial services firms based in the EU may not be able to continue providing services to customers in the UK;

  - if your business exchanges personal data with service suppliers in the EU, this could become unlawful on Brexit unless certain conditions are met (see under "IP and data protection" below).

See also under "**Commercial contract issues**", "**Export controls and sanctions**" and "**Environmental, social and corporate governance**" below.

Supplying your customers: goods

- If you export goods to customers in the EU or in countries with which the EU has an FTA, do you know what tariffs will apply under WTO rules? What impact will tariffs have on pricing? Have you made provision for additional transaction costs due to increased border red tape?

- Will your products face technical or regulatory barriers on Brexit – for example, if there is no agreement with the EU on mutual recognition of product standards?

- Is it necessary for your business to establish a presence in the EU or to appoint an EU representative? For example, EU product safety rules require suppliers which are based outside the EU to appoint an authorised representative in the EU (in many cases, the importer/distributor of the products is appointed as the authorised representative). See also under "IP and data protection" below.

- How would your business be affected if there is disruption to e.g. HGV traffic through the Channel ports? Consider what can realistically be done to mitigate the effects of disruption e.g.

  - exploring alternative transportation arrangements such as short sea shipping;

  - increasing storage capacity in the EU to accommodate a "reserve stock" which could be drawn upon if deliveries from the UK are seriously disrupted; and/or

  - ensuring that your EU distributor or logistics provider has adequate contingency plans in place.

See also under "**Commercial contract issues**", "**Export controls and sanctions**" and "**Environmental, social and corporate governance**" below.

Supplying your customers: services

- If you provide services to customers in the EU or any country with which the EU has an FTA (which may cease to apply on Brexit), do you rely on any form of regulatory "passporting" or similar measures designed to facilitate market access for services providers? In particular, consider the following:
  - Can WTO rules be relied upon to preserve equivalent levels of access after Brexit?
  - Is there any other set of rules or international convention allowing services to be provided to customers in the EU despite Brexit? (e.g. in the case of linear TV broadcasting, the Council of Europe Convention on Transfrontier Television should be considered).
  - Is it necessary for your business to be established in the EU to continue to take advantage of market access rights or to appoint an authorised representative in the EU? See also under "IP and data protection" below.
  - If your business exchanges data with customers in the EU, this could become unlawful upon Brexit unless certain conditions are met (see under "**IP and data protection**" below).
- Do your staff need to be able to travel/work in different locations in the EU? Can WTO rules be relied upon to preserve sufficient equivalent rights to travel/work after Brexit?

See also under "**Commercial contract issues**", "**Export controls and sanctions**" and "**Environmental, social and corporate governance**" below.

Commercial contract issues

Consider whether contracts may need to be amended or contingency plans made to address any of the following concerns:

- Is the "Territory" in relation to e.g. any distribution agreements or licences defined by reference to the EU? Does the contract need to be amended to make clear that, post-Brexit, the UK is intended to be included or excluded, as the case may be?
- Are changes needed to any provisions dealing with VAT? See under "Tax" below.
- Whose responsibility is it to comply with and/or to bear the cost of any customs formalities, import duties or other additional obligations which may be imposed as a result of Brexit (but may not have been anticipated when the contract was signed)?
- Could Brexit or events associated with it (e.g. market volatility) constitute an event of "force majeure", "material adverse change" or other event entitling one party to terminate or to be relieved of its obligations?
- Does your business have long term contracts which are likely to be affected by Brexit? Does the contract need to be amended to address any issues not anticipated when the agreement was entered into?
- Is there a significant currency risk? Can this be managed e.g. hedging or by obtaining payment in euros on contracts with customers based in the EU and then using those funds to pay suppliers based in the EU?

See also under "**Your suppliers: goods**", "**Your suppliers: services**", "**Supplying your customers: goods**" and "**Supplying your customers: services**" above.

Export controls and sanctions

- If you supply military, “dual use” or other controlled products or you obtain such goods from suppliers in the EU, either you or your suppliers may need licences, prior notifications or registrations in order to continue with such EU-UK trade after Brexit (whereas at present, such controls may not be required due to exemptions on internal EU trade). Such requirements could give rise to delays whilst the relevant conditions are complied with. Would disruption of this type be problematic for your business? If so, make sure that you and/or your suppliers have taken all possible steps to comply with the relevant requirements in advance of Brexit and consider the points made in sections above about other ways in which potential delay/disruption to supplies can be mitigated.

- Will your business be affected by sanctions legislation? For example, does your business contract with EU or UK subsidiaries of Russian blacklisted firms (which may be prohibited if, as appears to be envisaged by the UK Government, the UK leaves the EU customs territory).

Enforcement of contracts and dispute resolution

In transactions involving European parties or assets, we have seen some movement away from the use of English law and the jurisdiction of the English courts in contracts as a result of uncertainty over the future enforceability of English court judgments in EU member states. Whilst the UK is part of the EU, it is party (as an EU member) to the 2005 Hague Convention on Choice of Court Agreements which means that *exclusive* jurisdiction clauses in favour of the English courts will be respected in the EU. It is likely that the UK would accede to the Hague Convention in its own right following Brexit, so an exclusive English jurisdiction clause may still be enforceable, but other options include:

  - the use of non-exclusive jurisdiction clauses which will allow the flexibility of being able to choose the most appropriate jurisdiction at a later date, when it is clear which laws apply to establish jurisdiction and to what extent English judgments will be enforceable in the EU;

  - choosing another acceptable EU court; and

  - submitting disputes to arbitration which will continue to be enforceable in the EU (and other jurisdictions).

- We see no need to change standard choice of law clauses. English courts remain an attractive forum for resolving international commercial disputes.

IP and data protection

- Does your business rely on any EU-wide intellectual property rights such as Community Trade Marks or Community Design Rights?

  - It is unclear whether such rights will continue to apply in the UK post-Brexit. If they have not already done so, businesses may therefore wish to secure relevant UK national IP rights to ensure that protection is maintained.

  - In some cases it may be appropriate to consider obtaining protection under national IP rights in other EU countries as well, particularly if they are important markets for your products/services.

- Does your business export/import personal data to/from the EEA?

  - Unless the UK is recognised by the European Commission as offering adequate protection for personal data immediately after Brexit, additional steps may be needed to ensure exchange of such data remains lawful (such as putting in place agreements based on approved model clauses or binding intra-group corporate rules).

- It may be necessary to appoint an authorised representative in the EU for data protection purposes.

Employees

- Consider, in the short term:
  - conducting an audit of the number of EU nationals working in the organisation and in which part of the business they are working. Consider what support might be offered in the short term for employees and their families applying for EU residence documentation, and in future if UK visas become necessary post-Brexit;
  - keeping an eye on proposals for changes to visa requirements for EU nationals and any potential changes in employment legislation; and
  - the need for employee communications about possible changes.
- In the medium/long term (depending on the timetable for Brexit) consider the social security status of EU nationals working in the UK following Brexit.
- Longer term, you might need to:
  - review employment contracts, handbooks and policies in light of any legislative changes;
  - consider any necessary changes to practices (such as the calculation of holiday pay or asking employees to sign opt outs of the weekly working limits) which might flow from legislative changes; and
  - amend your employee incentive arrangements to take account of any changes in the prospectus regime.

Pensions

- Trustees of UK defined benefit pension schemes who have been given guarantees by companies resident in other EU member states will now be asking questions around the ease of enforceability after Brexit.

Tax

- **VAT:** VAT is a European tax which has been implemented into UK domestic law. In the longer term, the UK will be free to decide whether to retain or repeal existing VAT legislation, although it is unlikely that the UK Government will abolish VAT (or even replace it) due to the cost. At the moment, companies should check:
  - VAT provisions in their commercial contracts to ensure that these are "Brexit-proof". VAT provisions defined by reference to EU VAT legislation only may not cover UK VAT or any future replacement of it;
  - whether the business has any supplies which could be impacted by changes to the place of supply rules, and the time at which VAT is payable, as a result of the UK no longer being an EU member state. For example, cross-border supplies of goods from the EU to the UK will be subject to import VAT rather than acquisition VAT, resulting in UK VAT registered businesses (that have not been approved for deferment) paying VAT on supplies of goods from EU countries at an earlier time - the time of import - than would currently be the case, giving rise to a cash flow disadvantage; and
  - whether the business relies on any EU-wide VAT administrative simplifications. For example, suppliers of digital services can register for VAT in one member state and use the mini-one stop shop (MOSS) to discharge their VAT liability in other member states.
- **Withholding tax**: Broadly, UK parent companies receiving interest, royalties or dividends from subsidiaries elsewhere in the EU will receive those payments free from withholding tax imposed by the EU countries in which the subsidiaries are located (and vice versa) due to the effect of EU tax directives.

Outside the EU, the UK's network of double tax treaties will maintain the status quo for cross-border payments between the UK and EU countries with which the UK has agreed a 0% rate of withholding tax. However, UK companies may lose withholding tax protections where the rate of withholding tax agreed in the double tax treaty is at a rate above 0% (e.g. interest payments from Italian or Portuguese subsidiaries).

- UK domestic legislation currently exempts the receipt of dividends paid to a UK parent company from corporation tax (subject to the dividend satisfying the conditions of the dividend exemption). It is not envisaged that the UK will make changes to its dividend exemption following Brexit, as this would damage the UK's position as a holding company jurisdiction. Other EU countries could, however, tax EU parent companies on the receipt of dividends from UK subsidiaries.

- Corporate groups should consider what payments are made into the UK from an EU group member (and vice versa) to assess where additional taxation may arise.

Financial services regulation

- For UK companies engaged in the provision of financial services, Brexit will clearly have the greatest impact on those who rely on cross-border passporting rights. For those companies:

  - identify business lines reliant on EU passporting rights and key risks arising from Brexit;

  - identify key EU27 jurisdictions in which the organisation will wish to continue to operate;

  - begin considering whether certain operations should be relocated to existing EU subsidiaries or whether new EU subsidiaries will be required; and

  - continue to monitor the status of Brexit negotiations and determine whether restructuring may be needed for continued market access.

- Once the shape of the UK's future relationship with the EU becomes clearer, consider obtaining legal advice from overseas counsel in the relevant jurisdictions. **Note that there may be a long lead time for regulatory authorisation of financial services businesses in some jurisdictions, so you may need to take a decision on restructuring before the final outcome of the Brexit negotiations becomes known.**

Environmental, social and corporate governance ("ESG")

- For companies operating in an area in which 'product-related' environmental and safety controls apply (including in the chemicals, pharmaceuticals, food and consumer goods sectors), a close eye must be kept on the approach the UK takes to the various EU market access regimes.

- As many of these regimes are currently set out in EU Regulations and have not to date needed to be transposed into domestic legislation, they will cease to apply post-Brexit. New UK-wide legislation and national bodies are likely to need to be established going forward. UK manufacturers wishing to export to the EU may therefore need to continue to comply with both the UK regime and existing EU product standards (to the extent that such regimes may differ). Whilst Government policy, at least in the short term, is to avoid reducing environmental standards overall, there could be a move to a more risk-based approach, for instance. Companies exporting to the EU will also need to consider appointing representatives there for internal market product compliance purposes, and also consider issues such as data sharing.

- Consider also any changes which may arise in ESG reporting. Note that as the UK's Modern Slavery Act 2015 (along with a more general push for corporate transparency) was championed by Theresa May, it is likely that we will see (if anything) a ratcheting up of corporate reporting obligations in this area. However other areas of ESG reporting, such as energy auditing, are based on EU-driven initiatives and may be affected given the ongoing Government review into the simplification of business energy and carbon reporting schemes. However, in view of the wider trend towards increased transparency in sustainability reporting, the nature of the matters that need to be reported may remain substantially the same.

FOR FURTHER INFORMATION, PLEASE CONTACT

10 Snow Hill
London EC1A 2AL
T: +44 (0) 20 7295 3000
F: +44 (0) 20 7295 3500
www.traverssmith.com

Chris Hale
Senior Partner

E: chris.hale@traverssmith.com
T: +44 (0) 20 7295 3263

Will Yates
Partner, Private Equity

E: will.yates@traverssmith.com
T: +44 (0) 20 7295 3460

Paul Dolman
Head of Private Equity

E: paul.dolman@traverssmith.com
T: +44 (0) 20 7295 3274

Richard Brown
Partner, Commercial, IP and Technology

E: richard.brown@traverssmith.com
T: +44 (0) 20 7295 3254