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Brexit – Major Upheaval and Change

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As the UK leaves the EU, in light of the seismic result of the United Kingdom referendum this morning, there will be an immense amount to do, for the UK and the remaining EU, and for companies that are either based in, or have interests in the UK. It will be necessary both to consider the *existing* positions of companies and individuals and how to achieve the best solutions in any future relationship between the UK and the remaining EU. The key theme is "*whether specific solutions can be agreed*" as illustrated below.

Initially, there will be *tremendous uncertainty*, because it is not known what the UK will seek, or what the remaining EU Member States will accept, as an agreement on their future relationship.

The most relevant ideas so far focus on an *ad hoc* bilateral agreement between the UK and the remaining EU (e.g. starting from the agreement between the EU and Switzerland, but with variations) to a more distant, World Trade Organization ("WTO") based relationship. The arrangement that Norway has with the EU would appear to be a non-starter in the UK, since it requires Norway to accept all EU Single Market legislation, including free movement of people across the EEA (the EU, plus Norway, Iceland and Liechtenstein).

Both the UK and the EU also have complex internal political issues and agendas now. The UK will be seeking to maintain as much continuing EU Single Market access as possible. The EU will be concerned not to undervalue market access and/or give an incentive for others to seek similar referenda. The relevant meetings will start shortly.

In every area, precise assessments will be necessary. A few legal points are clear already:

1. *Article 50 of the Treaty of European Union provides for the leaving Member State to give notice to leave and negotiations on exit to take place within a two year period from notice.*

- Most think that such a period will be too short to agree on withdrawal and the UK's future relationship with the EU. It may be necessary therefore to agree on an *extension* in the negotiating period. However, that has to be accepted *unanimously* by the European Council, composed of the remaining EU Member States, so it is not clear what will happen.

As a result, Mr. Cameron has announced that he proposes to discuss with his EU counterparts *when* the UK should give notice to trigger the running of time formally (or hold off until after October when his successor as UK Prime Minister will be announced).

- The UK Government has estimated it will take *over a decade* to sort out the EU legacy of shared rules. However, practically that is likely too long so, even if there is an extension in the negotiating period, *specific solutions will have to be agreed.*
- *The first major concern* in the negotiations will be to achieve some certainty as to the interim position after the two year period, pending final agreement on withdrawal and the future relationship between the two sides, with the *priority issue being what to do for those with existing rights under the EU rules.*

2. *In principle, the UK will lose access as of right to the EU Single Market.*

- The key point here is that many UK based market participants (including those from third countries such as the United States or Japan) will be forced to move into the remaining EU in order to access the Single Market, *unless a solution can be agreed*, which allows them continued access.
- Most expect that many *financial services providers*, which use and rely on EU "*passporting*" (the right to establish a business or provide services in the EU from a "home base" in an EU Member State, here the UK) will move that home base into the remaining EU; whilst retaining a secondary base in the UK *for* the UK.

3. *UK based companies also may have to move production into the EU.*

- Companies that currently produce in the UK *for the* EU, whose products are *subject to customs duties* if entering the EU (such as the automotive industry) may be expected to move their production for the EU into the remaining 27 Member States, *unless a solution including a customs union can be agreed.*
- Otherwise, those companies that keep their production *outside* the EU will still have to comply with EU rules to access the EU market (e.g. product standards).

4. *A great many existing commercial relationships will be called into question unless specific solutions are agreed.* To give a few practical examples:

- *Football players* from the EU Member States playing for English clubs (and *vice-versa* for remaining EU Member State clubs) will lose *rights* to play (under EU free movement rules) and will fall into "third country" visa and quota regimes *unless a specific solution is agreed.*
- *Electricity companies* using and relying on trans-border grid systems between the UK and remaining EU Member States (such as France and Belgium) to supply customers will find that their competitive position and rules of trading are materially changed, *unless a specific solution can be agreed.*
- A UK-based *freight haulage business* will face major issues, if it uses EU "cabotage" rights (rights to pick up and move full trucks between destinations on the Continent on a trip), as well as transport rights to and from the UK. Those "EU rights" may disappear for UK companies and *vice-versa* for companies in the remaining EU Member States seeking to

offer transport services in the UK, *unless a specific solution is agreed*.

5. *Both the UK and the EU will have to organise how they will deal with the consequences of Brexit*.

- Depending on how much EU law the UK decides to keep in its legislation, businesses that wish to trade with the UK and the EU *will have to comply with two different legal systems*, losing the benefit of only complying with EU law. This means potential issues as to product standards (as noted above) and potential issues on the entire way that businesses are conducted *unless specific solutions are agreed*.
- In some cases, the UK may retain the existing EU-based legislation with which it agreed previously, *but without the formal binding links to the EU system*, such as the European Commission ("EC") or other EU Agency coordination. The interpretation of EU rules by the EU Courts will also not be binding in UK law. This raises the prospect of diverging rules and practices over time.
- To the extent that the EU now has responsibility for regulating issues centrally, which will end, *the UK also will have to organise to fill the gap (or not)*. Significant impact is likely in the financial services sector (in which a single rulebook at EU level has been progressively adopted since the financial crisis), telecommunications, transport, energy and utilities (including REMIT), intellectual property, and chemicals (including REACH) and environmental standards.
- The EU will also have to move its agencies out of the UK (e.g. the European Medicines Agency and the European Banking Authority).
- If the UK is outside the EU system, *the UK and the remaining EU Member States* will also have to decide to what extent they will want *to cooperate* in specific areas and how.

6. *In many areas, such as competition law, companies will face duplication.*

- As regards *merger control*, companies may need to have their mergers and acquisitions cleared in Brussels *and* London. No "Brussels one-stop-shop" review valid for the EEA, as now: One review by the EC for the 27 EU Member States (and three EEA Member States) and another by the UK Competition and Markets Authority ("CMA") for the UK.
- *Global cartel immunity applications* will also have to be presented to both the EC and the UK CMA, with the latter having to investigate actively each such application, rather than relying on the EC to do so.

7. *Material concerns about State aid may be expected.*

- In principle, the UK Government will have greater latitude to grant State aid to UK businesses. However, it will have less ability to complain about any State aid granted to competitors by other EU Member States that disadvantages UK businesses.
- *Unless a specific solution is agreed* State aid to companies in the UK or the remaining EU Member States, that affects competitors in the "other region", would fall to be reviewed under more general trade rules, which are generally less direct and effective.
- However, insofar as markets are linked and/or UK companies seek access to the remaining EU Member States for their products and services, one may expect at least

coordination on decisions governing such aid to be a major issue.

8. *The new EU General Data Protection Regulation, which was set to enter into force in May 2018, will not apply in the UK.*

- Data transfers from the EU to the UK therefore will not be seen as internal transfers, meaning that they will be prohibited, unless the EU determines that the UK affords adequate protection (which is a difficult proposition in practice on the case-law).
- Alternatively, transfers will need to be covered through other means currently used for Trans-Atlantic transfers (Binding Corporate Rules, Standard Contractual Clauses, Privacy Shield-like systems), which are under discussion now. Technology companies with their main EU base in the UK may decide to relocate as a result.
- This can be expected to have an impact on inward investment into the UK by third-country information technology, e-commerce and digital service providers.

9. *The UK may lose the automatic benefit of free trade agreements ("FTAs") put in place by the EU.*

- The UK will have to take full, independent responsibility for its own trade agreements with the rest of the world in the future. Separate questions exist as to the continued application of existing FTAs and other bilateral or multi-lateral treaties and what the effect of Brexit will be on ongoing negotiations such as TTIP.
- Some argue that the relevant trade balances between the UK and third countries, whilst more country specific, may be less advantageous to the UK than those agreed with the EU of 28 countries; although others argue that the UK may be able to go beyond what the EU as a whole can do, including in terms of overall levels of liberalization.

10. *Intellectual property rights and their enforcement will be affected.*

- UK IP rights are derived to a large extent from EU law and there will be a number of consequences, particularly as regards European unitary trademark and design rights, which will no longer apply to the UK upon its exit. Presumably a new UK converted right will be introduced.
- Traditional European patents are not affected, as they are granted by the European Patent Office under the European Patent Convention, which is not an EU instrument. However, the UK will not be part of the forthcoming EU unitary patent, or the Unified Patent Court. Although these measures required ratification by the UK, they will almost certainly nonetheless go ahead without it, because the Unified Patent Court Agreement will be revised, or a new version agreed. This will cause some delay.
- Some practical issues that IP holders, licensors and licensees should have in mind include:
  - License agreements referring to the EU and the UK should take into account that UK will no longer be part of the EU. They should also cover any new UK converted rights.
  - Future trademarks and design rights should be filed nationally in the UK, in light of the uncertainty as to how any scheme to convert from EU unitary rights will operate.
  - Injunctions previously granted (whether by a UK or other EU court) under a unitary right

should be reviewed to ensure that they extend to the UK.

We will stop here, because books can and will be written on the full picture.

WilmerHale's Brussels office has been advising clients on EU regulatory, trade and market access issues since 1990. ***If you need advice or representation on specific questions and issues, WilmerHale's EU regulatory and market access teams would be happy to assist.***

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