

Challenges Arising from Brexit

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In the light of Brexit, uncertain times lie ahead! How can small businesses cope with the challenges which the withdrawal of the United Kingdom from the European Union will necessarily entail and with the uncertainty that will persist so long as no concluded agreement(s) has/have been struck between the British Government and its EU counterparts.

This article is intended to give the reader an idea of the issues which will arise in relation to five different subject matter areas, namely: Public Procurement, Intellectual Property, Corporate Restructuring and Insolvency, Consumer Protection, Competition and, lastly, the situation which will arise if no negotiated deal is agreed before the expiry of the two year period ending in March 2019.

Public Procurement

1. Following Brexit, it will be important for the UK substantially to maintain its body of procurement law. This will be crucial not only to facilitate negotiation of the fullest possible access to the EU Single Market, but also to becoming a party to the Government Procurement Agreement 2012 (GPA) (under the WTO), in order to ensure access to GPA parties' procurement markets and to gain access to the procurement markets of the growing list of countries which have applied to join (e.g. China).
2. Whilst the principal aim of EU public procurement law may be to open up procurement markets across national borders, the EU regime, and the UK's implementing legislation, also provide a system of fair and transparent procurement procedures which serve to ensure value for money and anti-corruption objectives through procurement. This should not be lightly discarded.

The Current Position

3. The EU public procurement regime is implemented into UK¹ law by the Public Contracts Regulations 2015, the Utilities Contracts Regulations 2016, the Concession Contracts Regulations 2016 and the Defence and Security Public Contracts Regulations 2011. This large body of procurement law "the EU public procurement regime" forms a very substantial legislative achievement, a detailed analysis of which is beyond the scope of this paper. Suffice it to say that, whilst there are aspects of the regime which arguably represent an unwelcome extension

¹ At least in England, Wales and Northern Ireland, since separate implementing legislation exists in Scotland

of EU law, it undoubtedly contains much to commend it. Indeed, the UK was enthusiastic about its adoption and has implemented all recent directives either ahead of, or by, the given deadlines.

The implications of Brexit

4. If the UK's domestic regime remains as is following Brexit, aggrieved UK-based tenderers will still be able to challenge UK procurement award decisions before the domestic courts. However, the removal of the Court of Justice of the European Union (CJEU) as the final arbiter on EU law in the UK, will mean that those national courts will lose an important source of jurisprudence on the interpretation of the EU procurement regime and the general principles of EU law applicable therein, unless other provision is made. Indeed, it is considered that those general principles that are not expressly incorporated into the existing legislation (such as non-discrimination and transparency) ought to be adopted as tenets of the common law.

5. Whether UK-based tenderers will have access to tenders awarded in other EU Member States will, of course, depend on the terms of the future UK-EU relationship. Ideally, any deal should provide the possibility for an aggrieved UK-based tenderer to bring a claim before the national court of the Member States in which the contracting authority/entity is based.

Extra territorial application

6. EU competence in the area of public procurement brings benefits beyond the EU internal market. Much has been made by Her Majesty's Government (HMG) of the promising opportunities in services exports that may flow from trade agreements entered into by the UK with countries such as China, Singapore, South Korea, Canada and the United States. It must be acknowledged that such agreements can be politically controversial insofar as they enable firms based outside the UK to acquire a commercial interest in services currently run within the UK public sector. Whatever the rights and wrongs of this, if an agreement is reached enabling the import of services into new sectors, its effect ought to be reciprocal; that is, it should also give rise to opportunities for the export of services to those countries, substantially expanding the market available to UK suppliers, beyond what is provided for under WTO arrangements.
7. This is currently achieved in part by the Government Procurement Agreement 2012 (GPA), which offers parties to it non-discriminatory access to most major procurement contracts, and to which the UK is a party through its membership of the EU. Current EU negotiations on such agreements could result in further opening of third country procurement markets, or parts thereof, to EU economic operators, which an individual state alone might lack the bargaining power to achieve.
8. A key problem in analysing the precise impact of Brexit is the uncertainty regarding the outcome of the forthcoming negotiations between HMG and the EU. Whilst the UK is itself already a member of the WTO for the purposes of other areas of trade, extra-EU government procurement is governed mainly by the GPA 2012,

which is optional and depends on specific accession. The UK is not a party to the GPA other than through its EU membership. Therefore, after Brexit, it will need to apply to accede to the GPA, in order to enjoy access to any significant procurement markets under the WTO rules.

9. Thus, a UK exit from the EU could have an unfortunate consequence in procurement terms. The UK would continue to benefit from WTO rights and may well in due course negotiate trade agreements with third countries that approximate to the position achieved, or aspired to, by the EU in its trade deals. However, by leaving the EU, the UK would, at least in the short term, lose the benefit of liberalised access to public procurement and other service markets under existing EU bilateral arrangements, and under the prospective agreement with the United States, which the EU 27 would continue to enjoy. The UK will of course, seek to negotiate bilateral arrangements with those third countries, though it is far from clear that the terms it could secure would be as favourable as the EU equivalent.

Intellectual property

Impact of Brexit

1. Intellectual property disputes involving patents, trademarks and passing off actions, copyright and design disputes, and confidential information are likely to be affected by Brexit in a number of ways.
2. In relation to the substantive law, in areas where rights are directly granted under EU law which are effective in the UK (such as EU registered trademarks and designs), the impact of ceasing to be a member of the EU would be that the rights in question

would cease to exist in the UK (unless otherwise provided for). To counteract this, the UKIPO is considering whether to provide for equivalent rights under UK law or, at least, a set of transitional measures to ensure that existing rights owners do not face a gap in protection. These considerations will address the various complexities, including the basis upon which the rights of proprietors and third parties may be protected.

3. In this, the UK Government faces a challenging exercise, with no guarantee that the outcome will satisfy everyone. Assuming UK rights can be secured in this way, it seems unlikely that they would be identical to those conferred by the EU systems. In many cases they would probably be similar. Moreover, this is likely to be an issue for specific areas of intellectual property law since much of it is enacted in domestic legislation or secondary legislation made under the ECA 1972. The secondary legislation would probably fall with simple repeal of the ECA but could be preserved by appropriate UK legislation, such as the Great Repeal Act. Consideration will also need to be given to the future application of the principle of the free movement of goods and the doctrine of exhaustion of rights, whereby the proprietor of a UK intellectual property right cannot exercise his right to prevent the importation and sale in the UK of goods which were first placed on the market in another EU Member State by him or with his consent (i.e. parallel imports).
4. The next issue is the interpretation of law. A significant proportion of current intellectual property rights are conferred pursuant to EU legislation (arising under EU Regulations or UK statutes implementing EU Directives) and their scope ultimately falls to be determined by the CJEU upon reference from national courts. If that ceases to be possible following Brexit, the UK courts would have the final say

as to the scope of rights originally conferred under EU law. There is a real risk of jurisprudential divergence. Moreover, unless provision was made to ensure that the UK (and undertakings in the UK) could continue to present arguments at the CJEU, including in cases pending at the date of exit, by way of interventions, the influence of UK law principles, which has been considerable, in this area would be seriously diminished.

5. In relation to the development of law, after Brexit, unless steps are taken to ensure that the interests of businesses in the UK and of businesses in other countries wishing to continue trading and to protect their rights in the UK, are taken into account in developing new IP regimes in the EU, such undertakings will not be adequately catered for in the UK and may be less able to influence the legislative process. At present, the UK's voice is of considerable importance both at the legislative stage and in interpretation of the law at CJEU level.

Corporate restructuring and insolvency

1. At present, the EU Insolvency Regulation (EUIR) determines which Member State has jurisdiction to open insolvency proceedings, provides for the proper law to be applied in those proceedings and provides for EU-wide recognition and enforcement of orders made in those proceedings, with only a limited basis for refusal of recognition. So far as main proceedings are concerned, it uses the “centre of main interests” (“COMI”) test for jurisdiction. COMI is a concept which has generated controversy, in particular where COMI-shifting is employed to enable a debtor to take advantage of a more debtor-friendly jurisdiction. It nevertheless appears to be accepted as a sound basis for the allocation of jurisdiction, and for the purposes of recognition and enforcement, and it was subsequently adopted as the basis for recognition of main proceedings under the UNCITRAL Model Law.

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2. A notable exception from the ambit of the EUIR are schemes of arrangement under the Companies Act 2006 (“the 2006 Act”). Complex cross-border schemes, including in respect of foreign companies, have been a notable feature of the UK legal market over a number of years. Although there remains a degree of uncertainty, the current view is that schemes fall within the Regulation on Jurisdiction and the Recognition and Enforcement of Judgments in Civil and Commercial Matters (“the Recast Brussels Regulation”). So also do proceedings which, although taking place in an insolvency context, are not necessarily “insolvency” in nature; for example, proceedings against a director for breach of duty. These too fall within the Recast Brussels Regulation.
 3. Neither the EUIR nor the Recast EUIR attempt to harmonise the substantive insolvency law applicable to insolvency proceedings falling within the EUIR. However, last year, the EC published its Proposal for a Directive on Insolvency, Restructuring and Second Chance. The focus of the proposal is on restructuring and rehabilitation, and current UK law is essentially consistent with much of its content. Nevertheless, the proposal represents a significant change of EU legislative intent in this area.
 4. In general terms, so far as UK restructuring and insolvency proceedings are concerned (including schemes of arrangement under the 2006 Act), recognition, assistance and enforcement in the EU will depend upon the domestic private international law principles applied by the courts of the relevant EU Member State. In this context, it should be noted that only four EU member states (Greece, Poland, Slovakia and Slovenia) have incorporated the UNCITRAL Model Law into their domestic law. There will be, therefore, a considerable degree of uncertainty as to the extent to which UK insolvency proceedings, and orders made by UK courts, will be recognised and enforced in EU member states. Where EU legislation provides for or contemplates “third state” or “third country” recognition (as does, for example, the Recast Brussels Regulation and the BRRD), then these provisions will take the place of

the existing regime. However, recognition and enforcement is obviously less certain in the case of third country recognition.

5. It is difficult to assess with certainty what impact Brexit will have on the legal market for the provision of services in this field. The UK is undoubtedly seen as a centre of excellence in this field and, anecdotally, at least some hold the view that this can be maintained with some effort, provided that there is sufficient clarity at a sufficiently early stage as to what the legal consequences of Brexit will be. However, there is increasing national competition in this field; Singapore is aggressively promoting its legal system in international restructuring and insolvency cases, and certain EU member states (for example, the Netherlands) have adopted, or are in the process of adopting, restructuring regimes analogous to schemes of arrangement which may be an attractive alternative for businesses with a significant presence within the EU.

Consumer protection

Consumer Contracts

1. Contracts for the sale or supply of goods, services and digital content are governed by the Consumer Rights Act 2015 (“the CRA”). The CRA is a legislative hybrid – it implements some EU provisions, such as the Council Directive on unfair terms in consumer contracts (Part 2 of the CRA) but it also contains provisions which are domestic in origin. The interrelationship of domestic remedies for breach of sale of goods contracts with European remedies has been the subject of a number of legislative changes and there are further potential changes in the offing. Part 2 of the CRA represents the UK’s third legislative implementation of the unfair contract terms Directive and the key test of unfairness has recently been

interpreted by the Supreme Court in accordance with a decision of the CJEU. The CJEU has had a crucial role in the development of the law in this area and it is unlikely that this will stop. The UK Government will therefore need to decide whether and to what extent past and/or future CJEU decisions are to have effect in relation to this area.

Unfair commercial practices

2. The Consumer Protection from Unfair Trading Regulations 2008 (“the CPRs”) implement the Unfair Commercial Practices Directive. The CPRs are the key enforcement mechanism relating to the manner in which goods and services are sold to consumers. They prevent consumers from falling prey to misleading and/or aggressive practices by providing for criminal offences relating to misleading actions, misleading omissions, aggressive commercial practices and actions which are contrary to the standards of professional diligence. In each case offending behaviour attracts criminal liability and/or civil liability under the enforcement provisions of the Enterprise Act 2002.
3. Again, the decisions of the CJEU have been fundamental in developing understanding of the key concepts underlying the UCPD. The concept of a “transactional decision”, for instance, underpins liability under the UCPD – if a trader’s actions would not have influenced a consumer’s transactional decision there is no liability. However, the interpretation given to that phrase by the High Court has been markedly different to the approach taken by the CJEU in a later case.

Consumer finance

4. The UK has a complex and sophisticated system of regulation in relation to consumer lending. The provisions of the Consumer Credit Act 1974 have been affected by the Consumer Credit Directive in a number of ways, not least that they have limited the extent to which this law has been able to develop domestically. In some ways, the CCD has provided for a system which is simpler than its UK predecessor – for example the requirements of the Consumer Credit (Agreements) Regulations 2010 (which reflect the requirements of the CCD) are much less prescriptive than the 1983 Regulations which they have (partially) replaced. A European standard method for calculation of the APR is likely to continue to be considered a good idea. The biggest single issue for businesses in this area is likely to be the licensing regime. Consumer lenders are currently able to take advantage of the “passporting” system where they wish to trade in another Member State, thus avoiding the need to satisfy many different regulatory requirements. The continued operation of a system of this nature will be very important.

Cross-border enforcement

5. The CPC Regulation currently provides a mechanism whereby enforcement bodies in each Member State can take action against breaches of consumer law by a trader in another Member State. Although this rarely takes the form of court proceedings, there are numerous instances where UK regulatory bodies take action on behalf of regulatory bodies in other member states and vice versa. There are plans for reform of this mechanism within the EU. The Government

should give serious consideration to retaining this important form of protection, or to negotiating a similar scheme of cooperation post-Brexit.

Holidays and Travel

6. With effect from July 2018, the Package Travel Directive is repealed and replaced by Directive (EU) 2015/2302 of 25 November 2015 on package travel and linked travel arrangements which extends passenger rights to arrangements where the traveller selects travel service components and purchases them from a single business and to linked travel arrangements where a traveller who has booked one travel service online (e.g. a flight) is invited to book another travel service (car, hotel etc.) through a targeted link, and the second booking is made within 24 hours.

Competition law

1. At present, businesses and consumers in the UK enjoy the protection of two parallel and closely linked regimes. The principal provisions of UK competition law are contained in the Competition Act 1998. It contains prohibitions on cartels and other forms of collusive agreements, as well as abuse of dominant position. Its provisions are closely mirrored on the requirements of EU law.

The Implications of Brexit

2. Whilst Brexit will not affect the ability of UK authorities to enforce UK competition law in the UK, those authorities in fact take very few competition enforcement decisions. In practice, the system of competition law protection in the

UK would be substantially weakened, constrained by the far more limited resources and territorial reach of the national regulators. If the current system of efficacious remedies and consumer protection is to remain in place it is critical that consumers in the UK are able to rely upon decisions of the European Commission. Otherwise, competition enforcement (both public and private) will be severely weakened.

3. The starting point is that the CA98 gives effect both to our domestic competition law and also permits decisions of the European Commission to be relied upon in order to found follow on actions. The formal position is that those provisions would not be affected by repeal of the European Communities Act 1972 as they are contained in primary legislation.
4. It is likely that preserving those powers would therefore enable UK courts and consumers to continue to enforce the decisions of the European Commission. The Commission will however continue to make decisions which impact upon UK business which trade in the EU. At present, its investigations encompass distortions of competition within the whole EEA, including the UK. Depending on the terms of Brexit, that may well come to an end, unless steps are taken to ensure that UK markets and consumers stay within its remit for competition law purposes. There is a powerful public interest in arrangements which enable it to continue to do so.
5. One model of such arrangements is provided by the EEA Agreement. Its competition provisions are materially identical to the EU regime. As a consequence, competition enforcement decisions of the Commission expressly apply the provisions of the EEA Agreement and frequently consider cartel activity throughout the EEA, so as to encompass markets in Iceland, Norway and Liechtenstein as well as the EU. If the UK entered into comparable arrangements, then there would be no detrimental

impact to the efficacy of the competition regime arising from Brexit.

6. There are two further technical matters of practical significance. First of all, a key driver of competition enforcement in both the UK and EU is the use of leniency arrangements, under which participants in cartels may obtain immunity or reduction in fines in exchange for cooperation. At present an application in the UK is sufficient to trigger leniency across the EU. If that “one stop” approach were lost, there would be a diminished incentive to apply for leniency, and a need for multiple filings. Thus, following Brexit, coordinating measures would be highly desirable. Secondly, there would be a need for protection for UK enterprises from the risk of double jeopardy in the form of fines for the same conduct in the UK and by the Commission or other regulatory authorities in the EEA.

The Impact of No Deal

1. If no withdrawal agreement has been put in place by the end of the two year period under Article 50, the EU Treaties will cease to apply to the UK. EU legal rights will disappear overnight. The effects will be loss of rights, serious economic damage, and confusion and uncertainty. For good reason, this has been described as “falling over the cliff-edge”.
2. Effects of a no-deal include:
 - Trading on WTO terms with resulting disruption of UK free trade in goods and services with the EU, and with dozens of countries the UK trades with via EU free trade agreements.
 - Uncertainty for millions of UK and EU migrants about their residence rights, along with their rights to work, to health care, and to state pension rights.

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- UK migrants at risk of different treatment in different EU countries with their rights depending on the state of national law in the EU country in question at the time of Brexit.
 - A seriously increased risk of a “hard” border between Ireland and Northern Ireland, to enforce collection of tariffs of 30-40% on agricultural products currently traded without tariffs and without customs checks across the open border.
 - Loss of the rights of UK tourists and business travellers to use their European Health Insurance Card in EU countries, reduced access to EU air passenger rights, loss of protection from excessive roaming charges, loss of rights of NHS patients to cross border health care, and uncertainty over visa-free access to EU countries.
3. While tariffs on UK exports to the EU would on *average* be low, in some sectors they would be high enough to inflict serious damage on UK trade. Imports and exports of cars would face 10% tariffs. The confidence of inwardly investing manufacturers would be shaken, and their future commitment to the UK would be called in question. Trade on WTO terms would mean the transfer of the EU-facing business of numerous UK banks and other financial businesses from London to subsidiaries in the EU, involving the transfer of highly paid jobs whose holders would in future pay their taxes in EU countries other than the UK.

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4. An unplanned Brexit would also separate EU regulatory agencies (such as the European Chemicals Agency, the European Medicines Agency, and the European Aviation Safety Agency), from the commercial activities in the UK which they currently service and regulate. The UK would either have to ensure that new or existing home-grown agencies could fulfil these responsibilities, or seek to maintain links with the relevant EU bodies after Brexit. If the UK and the EU did fall over the cliff-edge, that need not be end of negotiations. The economic and political shock for the UK and the EU could lead to renewed attempts to deal with outstanding issues. The position might be recovered, and a belated withdrawal agreement which included transitional arrangements might be put in place.
 5. It is always possible that negotiations might fail. Trade on WTO terms could continue for a prolonged period. Public opinion on both sides might harden. Relations between the UK and the EU might deteriorate so badly over trade as to damage highly important non-trade issues such as co-operation over internal and external security. This is a worst case scenario, but it is one which cannot be ruled out. It is surely an outcome to avoid, and every effort should be made to avoid it.
 6. While most of the Government's efforts should go into securing the best possible agreement with the EU, so as to avoid the cliff-edge, and a hard Brexit, the possibility of a "no-deal" is sufficiently real to justify planning how to manage it, including continued negotiations to recover the position.