Brexit: The possible legal implications of the UK's withdrawal from the EU

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Introduction

On 23 June 2016 the British people voted for the UK to leave the EU. In this document, we have set out what we see as the possible legal implications of this vote, organised by practice area.

The Government will now request the EU to start the Article 50 process of the Treaty on European Union – the only mechanism that exists for the exit of a member state. European Council sanctioned negotiations will then follow between the other 27 member states and the European Commission, before a vote of the European Parliament is called.

The UK will enter detailed negotiations about both the past and the future. Agreements will need to be concluded on how to "unwind" previous rights and obligations, with decisions taken on how the UK and the EU will interact in the future. These negotiations will need to fit within the two year period set out in the Treaty on the European Union, failing which the remaining 27 member states will need to agree to give the UK an extension.

The Government will have to conclude the exit negotiations as swiftly as possible, in order to proceed with trading negotiations with the EU and additional trading negotiations with non-EU countries. The time frame set out in the Treaty for a Brexit is two years but the Government has suggested that this would merely be the beginning (and not the end) of a Brexit. Some commentators have suggested a 10 year period from beginning to end but the time frame will depend entirely on how quickly the negotiations proceed.

The legal consequences of Brexit will be considerable: subject to the terms of new trading arrangements with the EU, EU treaties, directives, regulations and decisions of the European Court of Justice (ECJ) could cease to apply to the UK, unless specifically preserved by UK law; the ECJ will no longer have jurisdiction over the UK; the UK will no longer have the right to participate in various EU agencies; and EU agencies that are UK-based will probably move elsewhere.

The Government will have to find an alternative to membership of the EU. It has already set out a number of possible models for the UK outside the EU: the Norway model; a negotiated bilateral agreement, similar to the one between Switzerland and the EU; the Canada model; and the World Trade Organisation-only model. In the first two examples a trade-off had to occur between the relevant country and the EU between the level of access to the single market and the obligation to comply with key EU principles, such as the free movement of people. Norway and Switzerland also contribute to EU spending.

We hope that you find the following information useful. Please get in touch with your usual Bond Dickinson contact if you have any queries.
The Brexit vote has happened and the argument is that increased autonomy will permit Britain to be more flexible in its regulatory approach, allowing banks an international competitive edge.

However, EU membership saw Britain, more specifically London, become one of the largest financial markets in the world and the EU financial centre, often leading key reforms.

Only time will tell which approach will be adopted and whether exiting was the correct decision. However, banks and the markets are concerned - there is no precedent to follow here. Therefore it is unclear how Britain will have access to its largest customer (the EU) and what the legal, trading and regulatory implications will be. The consequences for banks are therefore equally unclear.

The genuine fear is that exiting the EU will cut trading activity and make doing business with the EU (which currently takes almost half of Britain's exports) more expensive and time consuming.

The 'Passporting' rules that enable EU headquartered banks to carry out business in other member states will no longer apply in the same form. This leaves two choices:

- banks with headquarters in Britain set up new EU-based headquarters; or
- to ensure continued competitiveness as a financial hub, Britain will have to negotiate a bespoke form of exit to ensure a form of ’Passporting’ continues. Every EU member state would need to approve this.

The terms of any bespoke arrangement cannot be accurately predicted and the timetable for such negotiations would not be under Britain’s sole control. However, two things are clear:

- the uncertainty of Britain’s post-Brexit transitional period (between the referendum and finalising the terms of our exit) could have a material adverse effect on the business, financial condition, credit ratings and operations of banks in Britain; and
- there is a real risk that bank headquarters will leave Britain to continue their pan-European strategies.
Parties to contracts with a term that will extend beyond the date of the exit would be well advised to consider whether the consequences of Brexit will affect the operation or performance of their contracts. For example, if in practice a contract can only be performed because of some feature of EU law, such as free movement of goods, then a result of the UK leaving the EU may be that the contract is frustrated or performance excused because of its force majeure provisions.

Alternatively, one of the parties may find that the contract can be performed but (for example because of import duties which are imposed following Brexit) it is no longer profitable for it. In such event it is likely to want to look for some means of terminating the contract or suspending performance and so will need to analyse whether the force majeure provisions in the contract allow it to suspend performance and eventually terminate the contract. The other party to the contract may well take a different view on whether Brexit constitutes a force majeure event.

Such issues are bound to lead to disputes and in order to pre-empt them parties should review their contractual arrangements in order to assess whether Brexit is likely to have unplanned (and undesired) consequences for each contract.

Many UK trading laws derive from EU legislation such as regulations governing product safety, unfair commercial practices and consumer rights when buying online.

The implications of Brexit on such issues will depend on the nature of the UK’s exit from the EU and how legislation has been incorporated into UK law. For example, Acts of Parliament, such as the Consumer Rights Act 2015 that governs consumer rights and remedies in respect of contracts for goods, services and digital content, are standalone pieces of legislation that will remain following the "out" vote.

However, many EU trading laws are incorporated into UK law by secondary legislation under the European Communities Act 1972. If the 1972 Act is repealed following the UK’s exit, any secondary legislation passed under it will fall away unless the Government takes steps to save it. Key trading laws falling within this category include:

- Consumer Protection from Unfair Trading Regulations 2008 – governing aggressive and unfair commercial practices
- General Product Safety Regulations 2005 – setting out product safety standards and obligations regarding product withdrawal/recall
- Consumer Contracts Regulations 2013 – governing distance sales of goods and services to consumers

It is impossible to predict at this stage how and which EU-based trading laws will be amended, repealed or remain as is. If the Government has the ability to make sweeping reforms, we consider that it will be unlikely to do
so, at least in the short term, due to the uncertainty and disruption it is likely to create. A review on a piecemeal basis is much more likely. In any event, exporters to the EU will still need to ensure that their products are compliant with the applicable EU standards.
3 Commercial disputes

Disputes about existing contracts

The UK exit may impact on existing contracts, particularly those based on EU legislation. Parties may try to avoid contractual obligations or renegotiate a contract. With regard to existing contracts (that govern relationships beyond the two-year window before the UK formally leaves the EU), parties should review relevant clauses such as force majeure and material adverse change. Parties may consider including a ‘Brexit’ clause in any new contracts so that the parties agree in advance what will happen on the UK exit.

Disputes about English law

A UK exit will mean that some English law may be repealed or amended. This may lead to a period of uncertainty over both UK legislation and how pre-exit EU case law impacts on the UK courts post-exit. These uncertainties are likely to lead to disputes.

Jurisdiction and enforcement

Unless decided otherwise, the UK exit will mean that the Recast Brussels Regulation will not apply to the UK. It may be that the UK and EU enter into a parallel arrangement on the same/similar terms as the Recast Brussels Regulation. Alternatively some or a combination of the following regimes may apply:

- English domestic rules on jurisdiction and enforcement of judgment.
- The Brussels Convention.
- The Lugano Convention (subject to UK accession).
- The Hague Convention (subject to UK accession).

Unless an agreement is reached, the UK exit will mean that there will be no automatic enforcement of judgments between the UK and EU. Without such agreement, enforcement between the UK and remaining EU member states is likely to take longer, cost more and generally be more difficult.

The current protection against EU parallel proceedings will not apply on the UK exit. If the UK accedes to the 2007 Lugano Convention, some protection against EU parallel proceedings will apply, however not the recent changes introduced by the Recast Brussels Regulation giving precedence to the courts of the country that the parties have agreed have exclusive jurisdiction (blocking the tactic known as an 'Italian torpedo').

Parties with an English jurisdiction clause concerned about enforcement within member states would be advised to make sure that they have an exclusive English jurisdiction clause.

Governing law

On exit the conflict of law rules currently set out in the Rome I (contractual obligations) and Rome II (non-contractual obligations) Regulations will not apply in the UK courts. It may be that the Government decides to continue with the current rules but with the English courts taking the role of the ECJ. Alternatively they could revert to the pre-Rome I and II rules.
contained in the Rome Convention (contractual obligations) and the Private International Law (Miscellaneous Provisions) Act 1995 (non-contractual obligations). The Rome Convention is very similar to Rome I and most commercial contracts contain an express choice of law clause in any event. However, the old rules governing non-contractual obligations do not allow parties to choose the law that applies to non-contractual relations, which may lead to a different conclusion than that under Rome II.

The remaining EU member states will continue to apply Rome I and II.

Service

The UK exit will mean that the EU Service Regulation will not automatically apply and permission to serve proceedings out of the jurisdiction may be required. This will increase the time and cost of service out of the jurisdiction. Parties doing business with non-English parties should make sure they appoint an agent for service in England where they have agreed to the jurisdiction of the English courts.

Anti-suit injunctions

The English courts may issue an anti-suit injunction if the court of a remaining member state fails to recognise an English jurisdiction clause. Since 2004 these injunctions have not been allowed by the ECJ.

Arbitration

The UK will remain a party to the New York Convention. The English courts may decide that they can issue anti-suit injunctions to protect a London arbitration, as the West Tankers case (which prevented anti-suit injunctions in support of arbitration) was a decision of the ECJ.
4 Competition

UK competition law is unlikely to be very different in the short term. The Competition Act 1998 is self-standing but is based on EU law and the substantive application of competition law mirrors European law. On this basis the nature of competition law in the UK will remain largely unchanged. However, over time there is the possibility that UK competition law takes a different approach than that which is practised in the EU and EEA. However, EU competition law will still apply to UK companies trading in the EU. Competition law enforcement may also result in parallel investigations in both the UK and EU.

Our exit from the EU is likely to end the "one stop shop" merger clearance regime that currently exists. This will require some transactions being notified both at the UK and EU level if they qualify for consideration under both competition regimes. M&A deals that trigger notifications in both the UK and EU means merger filings will potentially become more time consuming, complex and costly to notify and clear.

EU public procurement and state aid rules may no longer apply to the Government but it will still be bound by World Trade Organisation rules on state subsidies.
5 Construction

The effect of Brexit on the construction sector in the UK could be enormous in some respects and negligible in others.

**International labour force**

The construction sector is hugely reliant on skilled immigrant labour from the EU, perhaps more than any other sector except agriculture. In the absence of free movement of workers from the EU, the cost of construction in the UK will rise. In addition and perhaps even more significantly, the UK’s infrastructure pipeline will become impossible to deliver because demographic changes in the UK mean that there simply are not enough skilled workers entering the construction workforce. Could the sector have delivered the 2012 London Olympics without this labour? Will the sector be able to deliver future mega-projects, like EDF’s new Hinckley Point nuclear plant?

**International standards**

Design and manufacturing standards are international. Construction materials imported into the UK will almost certainly comply with EU standards and construction materials manufactured in the UK will need to comply with EU standards if they are to be exportable. Similarly, design standards are international. The UK has been working through a process of conforming British standards to the EU’s Eurocodes, eg British Standards for the design of structures implemented the Eurocodes in 2010. While there may be no legal reason for the UK to continue to implement these standards, it is difficult to see why the British Standards Institution would seek to turn the clock back or allow the UK to fall out of step with the rest of Europe.

**Legislation past**

From a purely legal perspective, the impact of Brexit will be less apparent and certainly less immediate. EU legislation can be directly effective but in the UK it is almost always implemented via UK legislation. The UK is one of the most compliant states in the EU so the UK will need to actively repeal or amend UK legislation implementing EU legislation before the law in the UK changes. To take a specific example, the Work at Height Regulations 2005 implement European Council Directive 2001/45/EC. It is unlikely that the UK will devote resources to amending this.

**Legislation yet to come**

Following Brexit, the UK will need to negotiate a series of bilateral trade agreements with the EU in order to access the Common Market. The experiences of Norway and Switzerland suggest that these agreements will require the UK to implement a great deal of EU legislation in any case (without the benefit of having had a hand in writing it). It is therefore likely that not only will the UK retain existing EU legislation, it will be obliged to continue enacting it.
As with many areas of law, the precise impact of Brexit on corporate law and transactions remains unclear at this stage. A few areas that may be affected, depending on the exact terms negotiated post-Brexit, are considered below.

**Impact on M&A**

There is much debate around the impact of Brexit on investor confidence and their appetite for M&A. The UK legal framework for private M&A transactions itself is not typically subject to much EU regulation. Brexit is therefore unlikely to have a significant impact on the legal framework (subject to the impact of Brexit on the competition regime and TUPE in the context of asset sales. Please refer to our competition and employment sections respectively for more on these topics).

There are EU measures in place to facilitate cross-border M&A transactions via the Directive on Cross-Border Mergers of Limited Liability Companies. This provides a framework for cross-border mergers to take place between companies in the UK and companies from other EEA states. The UK will be unable to take advantage of these provisions following Brexit if it becomes a non-EEA state but this may be the subject of negotiation.

**Impact on equity capital markets**

The precise impact on UK equity capital markets will depend on the terms of Brexit and whether the UK seeks to maintain the current regime in order to protect the London Stock Exchange’s status as one of the leading international securities markets.

EU legislation such as the Prospectus Directive, the Takeovers Directive, the Transparency Directive and the Market Abuse Directive has been implemented into UK law. We expect that many of these measures will initially remain in place post-Brexit but the regimes may diverge in future. This will depend on the specific terms negotiated and the approach taken by the Government and the Financial Conduct Authority.

Please refer to the financial services section for more on the regulatory angle and, in particular, the impact of Brexit on passporting rules.

**Impact on company law**

The main piece of legislation in the UK on company law is the Companies Act 2006 and related secondary legislation. Some of the provisions of the Companies Act 2006 are based on EU Directives such as the Accounting Directives, the Shareholder Rights Directive and the Company Law Directives but company law is mostly regulated by individual member states. The Companies Act 2006 has only recently been reviewed and amended following a lengthy consultation process. We do not anticipate that company law will be identified as a priority area for reform following Brexit. The purpose of the Companies Act 2006 was to repeal, simplify, modernise and consolidate existing company law. It may be that these aims will be revisited following Brexit with a view to further reducing the regulatory burden on companies originating from EU law.
Corporate groups with both UK and EU incorporated companies will need to adapt if and when EU and UK company laws diverge following Brexit.

A European company (or Societas Europaea) is a European public limited company subject to EU-wide laws, which can be created and registered in any one of the EEA member states. Such entities incorporated in the UK may be affected by Brexit and may need to relocate their registered office if the UK becomes a non-EEA state following Brexit.
EU citizens and their families currently have the right freely to travel, live and work across the EU. When the UK leaves the EU then this could have wide ranging implications, as UK citizens and EU citizens of other member states will no longer enjoy this automatic right of free movement to travel, live and work in EU/EEA member states. This restriction on movement will have a significant impact on current and future labour and trade markets in the UK and the EU and global trade outside of the EU.

When the UK leaves the EU it can impose its own controls on who is admitted to the UK and under what circumstances. EU nationals could be subject to the same visa rules and requirements that currently apply to non-EU nationals. It has been suggested that we may adopt a points-based system, similar to Australia, however this is unlikely to reduce net migration significantly. If it is no longer bound by free movement law, the UK may have more powers to deter and restrict the presence of certain categories of EU migrants and more powers to remove/deport national immigration offenders. The flip side is of course that while the UK could impose its own controls on EU immigration, the rights of UK citizens to travel, move to or work in an EU member state will be restricted by any visa entry requirements or restrictions that EU member states choose to impose.

Brexit is unlikely to result in any immediate changes as there will be a complex and lengthy transitional period. The UK will need to negotiate and agree on arrangements for its future relationship with the EU. Some EU nationals may have acquired rights to stay under UK legislation. For others, there could be reciprocal arrangements agreed between other EU countries so that EU nationals already working in the UK may be granted permission to stay in the UK and UK citizens working in other EU countries may be granted similar permission to stay in return.
8 Corporate tax

Brexit will have certain implications for taxation in the UK. Some aspects will be more particularly affected, such as VAT, whereas other taxes could be more indirectly affected. Of course, this all depends on how the UK actually deals with these taxes and also how any agreed system of VAT or parallel form of it is agreed between the UK and remaining EU.

VAT is an EU tax and has been imposed in the UK since accession in 1973. It is subject to EU directives, and although there are a number of individual state derogations, treatments and rates, the underlying system and alterations to it are EU in origin. Due to its revenue generation, VAT will not be abolished. However, its operation for importers and exporters could be affected. How UK exporters deal with VAT applying to both business and end consumer customers in the EU will need to be negotiated as part of a Brexit agreement. Also, non-EU exporters thinking of operating through an EU entity (such as for electronically supplied services) will need to monitor how any UK/EU agreement deals with services arising from the UK.

Direct taxes, such as corporation and income tax, are not subject to EU regulations and directives. However, the underlying principles of the EU such as freedom of movement of capital have impacted on issues such as loss relief (eg the Marks & Spencer case), as well as the treatment of distributions. Also, State aid rules have been used to ensure that unfair tax benefits are not conferred on favoured or domestic businesses. Initially, one may think that leaving the EU could allow greater flexibility for domestic tax policy (in that freedom of establishment principles and State aid rules may not apply). However, any trade deal with the EU may mean keeping these rules (and future EU interpretations) in place. There are also other international principles (such as from accounting boards and the OECD) that are promoted by the EU and which would generally be expected to apply to the UK in any event, as they would be applied by international convention.
It is very unlikely that the exit from the EU will cause widespread changes to employment law overnight – the majority of the employment law we have that has come from the EU will still form part of UK law unless and until it is amended or repealed.

This is because legislation from Brussels came to us in two main formats: regulations and directives. Regulations made in the EU are directly applicable and automatically binding in member states from the day they are made. Regulations in this field are comparatively rare – one example is Regulation (EEC) 1408/71, which deals with the application of social security schemes to workers and their families moving within the EU.

The majority of EU law relating to employment came to the UK as directives, which contained objectives to be achieved by a given date. The individual member states must then draw up national legislation to conform with the directive within a certain time frame. In the UK, directives have usually been implemented by statutory instruments and occasionally by Acts. The terminology can also be confusing – what we in the UK call the TUPE “Regulations” 2006 and the Working Time “Regulations” 1998 actually came from the Acquired Rights Directive and the Working Time Directive, and were not EU Regulations at all.

In recent years, the Coalition and Conservative Governments have been trying to remove what they call “gold-plating” of legislation – removing from the statute book those aspects of employee protection that go further than the basic objectives required by the original EU directives. These provisions were largely implemented by the previous Labour Government. For example, the Working Time Directive gives full time workers 20 days of paid annual leave, while the UK Working Time Regulations provide an entitlement to 28 days. The TUPE regulations also go beyond what the EU requires, with the addition of the concept of a service provision change, as do the Agency Workers Regulations 2010.

Having decided to leave the EU, this gradual process of amendment and/or repeal is likely to continue in the UK and could be significant, being dictated by the political aims of whichever political party is in power. Areas likely to be the focus for change include agency worker rights, annual leave, collective redundancy, discrimination legislation, part-time worker rights, fixed-term worker rights, paternity, maternity and parental leave, and protection of employment following the transfer of an undertaking.

However, an immediate large scale repeal of the employment laws that originated in Brussels is very unlikely, as it would cause massive disruption and cost. The impact on employers of a restriction on the free movement of workers is likely to be much more immediate and is covered in the corporate immigration section.
10 Energy

We will cover the potential impact of Brexit on three of the main strands that make up the energy sector, namely power and renewables, climate change and oil and gas. We will look at each of the three strands separately as there are fundamental differences between them and Brexit is likely to affect each of them very differently.

Power and renewables

At present, the core underlying obligation for the UK to source 15% of its energy requirements (which include electricity, heat and transport) from renewables by 2020 comes from the Renewable Energy Directive, which has direct effect in the UK. So Brexit will clearly have an impact on the effectiveness of this target. However, for electricity at least, the value of the target has almost been realised by projects that have already been deployed or are in the course of construction.

The path beyond 2020 at EU level is not clear. The UK has lobbied for a number of years for a carbon rather than a renewable energy target and, given that the Paris Agreement enshrined a decarbonisation target, that direction of travel might be reinforced.

For the broader power sector, there have been a number of recent developments establishing a common regulatory network and trading rules across the EU. Whether the UK will wish to continue to be a part of these after Brexit is an open question but in practical terms, the position of Ireland will require the UK’s participation in the scheme given the physical realities of the Interconnectors between the UK and Ireland and between Ireland and the continental countries. The EU has also promoted greater interconnection as a means of increasing security of supply. UK power companies have already raised concerns over the competitive position of such imports, which have advantages such as not paying the Climate Change Levy on their input fuel. Brexit would allow the UK to redress that imbalance by imposing tariffs on imports but that possibility would add materially to the regulatory risk faced by any new interconnectors and so would decrease the chances of any such developments being brought forward.

At present, almost all UK initiatives require State aid clearance (see the Projects and procurement section for more information) so whether it is to remain subject to the ongoing EU State aid rules could make a significant difference to the timescale for certain projects. As an example, the Hinckley Point project is still subject to a State aid objection by the Austrian government and, if EDF seeks additional support from the French state, then a further round of State aid clearance may be required.

Furthermore, the EU also sought to lead developments and encourage security of supply both through the evolution of carbon capture and storage and through the complex issue of gas storage. For carbon capture and storage, the EU provided funds to assist developers commercialising this new technology and the failure of that scheme had more to do with the position of the relevant projects in the UK market than any fault of the EU itself. On the question of gas storage, the physical fact remains that the UK is a net gas importer at the end of the existing
pipeline structures and must therefore rely on other countries making their
gas storage available if circumstances demand it. The UK’s current gas
storage facilities are small, a problem that is partly driven by the current
lack of demand for these facilities.

Climate change
Climate change is a complex topic. In the context of carbon trading, the
UK has transposed the European Directive into the Greenhouse Gas
Emissions Trading Regulations. So, while the regulations governing
carbon trading in the UK are domestic and will remain in force, the trading
scheme itself is run on a European wide level. Ongoing participation in
this scheme will therefore be required unless the UK attempts to set up its
own carbon trading scheme.

The UK does have a track record of taking an initiative in this area; the
carbon price support mechanism was initially introduced to provide a floor
price for carbon in the market. However, in the March 2016 budget, the
Government elected to continue its freeze on the level of carbon price
support making it clear that this initiative was not going to be pursued on
a unilateral basis.

The position on decarbonisation more broadly across Europe remains an
open question. As noted above, the outcome of the Paris Agreement was
a 2030 decarbonisation target across Europe as a whole so an allocation
will be required for the UK to have its own target. However, in some
respects, the Europe wide position is matched by domestic UK legislation
(enshrined in the Climate Change Act 2006) so, provided that the
Government does not seek to repeal that legislation as well, the
underlying obligation to continue with decarbonisation of the economy
through to 2030 and beyond to 2050 will remain in place.

Further key steps to decarbonisation, including the closure of all coal fired
plants in the UK by 2025, are domestic initiatives rather than originating
from Brussels. Whether the replacement of coal fired plants with gas fired
CGTs is a long term solution is a separate question.

Oil and gas
Unlike the above two strands of the energy sector, oil and gas is
fundamentally an international business not driven by Europe and, as far
as the North Sea is concerned, the EU chose (largely) to adopt the UKCS
regime when legislating on the industry. As a result there should not be
far-reaching implications for our clients in respect of their operations in
the North Sea as a result of Brexit. That said, our clients will be affected in
the same way as other businesses by the legal implications highlighted by
the practice areas (such as employment, commercial, corporate,
competition, corporate immigration and regulatory) covered elsewhere in
this document.

However, a vote to leave Europe is likely to reignite the Scottish
independence debate with the consequent implications that would have
for the UKCS regime; opinion is mixed as to whether that debate would
lead to a second Scottish referendum.
11 Environment and planning

Environmental regulation

The need for countries to respond to the challenges of climate change, greenhouse gas emissions, resource scarcity, waste management and biodiversity depletion has developed during the UK’s membership of what is now the EU. The vast majority of environmental legislation in the UK derives from the EU, although not all of it does so (see for example the Climate Change Act 2008 and the Climate Change (Scotland) Act 2009).

Along with urban planning, housing, economic development and agriculture and forestry and fisheries, competence for environment policy and law is devolved to each of Scotland, Wales and Northern Ireland. Prior to withdrawal from the EU new legislation will be needed in all UK jurisdictions to avoid vacuums in existing environmental law. However, until the new trading arrangements with the EU have been established it will not be possible to determine the nature of environmental policy and law since so much will depend on whether the UK seeks to participate in the Single Market.

The future direction of environment policy and law in an independent UK will be heavily influenced by new trading arrangements (especially with the EU), international treaty obligations, devolution and politics. It is not just about protecting the environment – environmental law requirements can encourage investment in innovation, new markets and technologies, and the generation of employment and economic growth.

Treaty and Regulations

Treaty provisions and European Regulations (which have direct effect in member states) would cease to apply from the time that the UK stopped being a member of the EU. However, the EU often uses Regulations to set product standards and prohibit the entry into the Single Market of any products that do not meet these. UK businesses seeking to export to other member states would need to ensure compliance with EU product standards, such as those set by Regulation (EC) No 1907/2006 of the European Parliament and of the Council on the Registration, Evaluation, Authorisation and Restriction of Chemicals (REACH), whether or not the legislation was introduced to keep such standards in all or parts of the UK. There will be a need to continue to do so however long negotiations over the new EU trading relations take, though the UK would not have any influence over the substance of such regulations on leaving the EU (and possibly before).

Directives

Directives, which identify objectives but leave member states some flexibility over how to achieve them, are usually transposed into UK law by statutory instruments. Virtually all environmental directives are transposed under powers granted by section 2(2) of the European Communities Act 1972. Following a Brexit vote and prior to the UK’s withdrawal from the EU, all four UK jurisdictions will need to legislate to avoid vacuums in environmental law and also to ensure that the UK complies with obligations under international environmental treaties. The sheer scale of environmental law within the UK and its reliance on EU law would make a
law-by-law assessment of changes a significant and time consuming piece of work. Legislating that all European law should continue to have effect unless revoked or amended could be an alternative option. However, at some point an environmental policy framework will be needed and there will be significant logistical challenges to developing this as one of many essential strands post Brexit.

The extent to which changes to European environmental law after Brexit might be accommodated will need to be addressed, as will the status of decisions of the ECJ on the interpretation of European environmental law. It is unlikely that access to the EU Single Market would be agreed by the EU under conditions that enabled the UK to gain a competitive trading advantage by reducing environmental standards.

Influence over EU law and policy

European environmental policy is developed by the European Commission in consultation with member states. The UK is active in contributing to EU environmental policy and law. At best, this influence will be diminished, even though trading arrangements with the EU could require compliance with some, if not most, EU environmental law.

UK environmental policy following Brexit could empower England, Scotland, Wales and Northern Ireland to develop their own environmental policies and laws, to the extent compatible with new trading agreements. However, unless power is ceded back to Whitehall to enable the establishment of a joint UK environmental regulatory framework post Brexit, loss of the common EU framework could lead to greater differences between UK jurisdictions, increasing red tape for business.

Enforcement of environmental law is expected to be weaker without the ECJ. For example, the litigation by ClientEarth - in which the Government has been required to take steps to improve air quality in areas that currently breach EU standards - relies on EU derived law and ECJ decisions.

Town and country planning

Within the EU, town and country planning is largely left to member states under the subsidiarity principle. Two aspects of environmental law that have an effect on development control within member states concern the provision of environmental information to inform consenting decisions and the attainment of specified standards, eg on air quality, water quality, habitats and species.

The process of environmental impact assessment (EIA) is intended to ensure that, prior to the granting of development consent for projects that are likely to have significant environmental effects, full information on such effects is gathered from the developer, statutory consultees and the public and taken into account in deciding whether to grant or refuse consent.

The Habitats Directive and the Wild Birds Directive are seen by some as vital for the protection of important habitats and species across the EU but by others as impediments to development since the grant of consent is prohibited in specified circumstances. New development is required to meet certain EU environmental standards and measures, eg ambient air quality and water quality.

It would be up to each of England, Scotland, Wales and Northern Ireland to retain as much or as little of EIA, habitats and species protection, air quality and water quality as they wished or agreed, subject to international
environmental treaty obligations and any provisions regarding cross border environmental standards and decision-making processes that may form part of the new trading arrangements with the EU.
Having now voted to leave the EU, we can expect an enormous impact on financial services regulation in the UK. Financial institutions (including banks, investment firms, insurers, insurance intermediaries, fund managers, mortgage and consumer credit firms and payment services providers) that have cross border operations will be impacted by the now inevitable change in the regulatory regime they operate under. The extent of this impact will now of course depend on the success of the Government’s negotiations with the EU.

EU law is the bedrock of financial services regulation in this country and the UK legislature is now faced with the task of deciding whether to replicate or diverge from the current state of affairs that has seen decades of enormous effort and investment in implementing EU law. For example, the EU’s capital requirements regulation (and all other EU regulations for that matter), which is directly applicable in the UK, will need to be re-assessed and re-enacted in the UK if lawmakers want it to continue to apply.

A number of the world’s biggest financial institutions have adopted a business model based onpassporting their EU-wide operations from the UK. Before Brexit the UK was the EU’s largest financial centre and financial institutions will be able to take advantage of the ability to ‘passport’ their services around the EU without having to establish expensive fully-fledged local operations in other member states only until Brexit is effective. It remains unclear if a similar regime will be put in place post Brexit and a failure to negotiate a similar scheme may result in restricted access to EU markets by firms based in the UK. Until the negotiation of the UK’s new relationship with the EU is complete, it will raise questions of where firms should base their operations.

Having to relocate operations would unlikely be the end of firms’ investment and strategic considerations. Product terms, distribution agreements and marketing literature will likely now need to be reviewed to deal with the impending regulatory separation.
Brexit will impact the law affecting the insurance market in the areas of regulation, underwriting, policy wordings and claims issues.

**Regulation**

The freedom to provide insurance and reinsurance services from one member state into another member state stems from the EU Insurance Directives and the Reinsurance Directive (all now replaced by the Solvency II Directive) and the Insurance Mediation Directive. These provide that if an insurer or intermediary is authorised to carry on insurance or mediation activities in the member state where it has its head office, that authorisation is valid for the whole of the EU. There are similar but not identical arrangements in place with countries in the EEA.

These rules allow international insurance and broking groups to trade in the EU from a subsidiary authorised in the UK. The exercise of this right is called “passporting”.

In theory, passporting into the EU from a UK authorised insurer or intermediary will no longer be possible following Brexit unless the UK becomes part of the EEA or bilateral arrangements are negotiated, such as those currently enjoyed by Switzerland in relation to establishing a branch operation by insurers. If such reciprocal arrangements are not agreed then in order to continue trading in the EU, insurers and brokers will have to establish authorised subsidiaries in an EU member state and obtain regulatory approval.

The main focus of the regulation of insurance business in the UK is on the solvency of insurance companies and the integrity and competence of their senior management and controllers.

The EU Solvency II Directive, which involved a wide-ranging reform of the EU insurance solvency regime, was implemented in January 2016 so is now part of UK law. Another major piece of EU legislation affecting the insurance sector is the Insurance Distribution Directive (IDD). IDD came into force on 22 February 2016 and member states have two years in which to transpose it into national law. Although the referendum took place before implementation of IDD by member states in 2016, Brexit is likely to take place later than the deadline for implementation of IDD into national law.

The UK will no longer have to comply with Solvency II; however the FCA and PRA have already implemented Solvency II requirements and UK regulators have been involved with and influential upon the design of the Directive, so it is likely that a similarly high standard of regulation will continue in the UK. This is particularly the case as the UK would wish to be granted regulatory equivalence so that UK authorised insurers could benefit from the advantages under Solvency II that this brings to third-country insurers.

**Underwriting**

An example of the effect that EU legislation can have on new lines of business is the EU-wide changes which are to be brought about by the
EU General Data Protection Regulation (GDPR) and the EU Network and Information Security Directive (NISD). The GDPR applies from 25 May 2018 and the NISD is also expected to be implemented within about two years. These pieces of legislation respectively require the mandatory reporting of personal data breaches and cyber security incidents for certain industries. Both of these developments are likely to increase the uptake of cyber policies and will also provide better data to enable more accurate pricing of cyber risks.

Following Brexit, will the UK still mandate this level of reporting, which indirectly benefits the cyber insurance market? Possibly not if the UK decides that the regimes are too burdensome.

In certain areas, such as health and safety and environmental reforms, EU regulation benefits liability insurers by helping to improve risk management, which in turn reduces the frequency or severity of claims. For example, much UK environmental law depends on EU regulations that are currently directly effective.

**Policy wording and claims issues**

Insurance contract law in England is not governed by EU law but has been shaped by UK derived law, such as the Marine Insurance Act 1906, the Insurance Act 2015 (coming into force in August 2016) and the Consumer Insurance (Disclosure and Representations) Act 2012, so no changes to these regimes will be expected after Brexit.

Just as with other disputes governed by English law and jurisdiction, insurance disputes will be affected by the impact of Brexit on the issues around governing law, jurisdiction, parallel proceedings, service of proceedings out of the jurisdiction and recognition and enforcement of judgments.

In addition, there is an insurance exception to the general rule under the Recast Brussels Regulation that only affects the insurer/insured relationship. This means that the insured has the option of bringing proceedings in his own domicile and the insurer is restricted to suing the insured in the insured’s country of domicile. The ability to circumvent the rules by a jurisdiction agreement is very limited, as the rules are there to protect the customer who is seen to be in a weaker position.

Following Brexit, where the Recast Brussels Regulation will no longer apply, the English court is likely to uphold express clauses between the parties conferring jurisdiction on the English courts. However, the question of how other EU member states will view such clauses, which will be a matter for the laws of those member states, could give rise to considerable uncertainty. It may be prudent for insurers to follow the provisions in the Recast Brussels Regulation anyway (and write them into the policy) in order to be seen to be treating customers fairly under FCA principles.
It is difficult at this stage to assess what will be the impact of Brexit on the UK’s intellectual property (IP) system since much will depend on whatever bilateral arrangements the UK enters into post its departure. However, because of both the unitary nature of some European wide intellectual property rights and the international nature of intellectual property systems, in all likelihood even with certain specific bilateral arrangements being put in place, such as those that already exist between Norway and the EU, it is safe to say that the effects in this area of the law are likely to be profound.

**European Union trade marks and community designs**

The European Union trade mark (EUTM) and Community design (CD) systems are unique property rights that spread across the EU. The rights, which are very much a creature of the EU, provide the opportunity for applicants to file a unitary trade mark or design that covers all 28 member states, including as of today, the UK. The laws that currently govern the EUTM and CD systems are the EU Community Trade Mark Regulation (207/2009) (EUTM Regulation) and the EU Community Design Regulation (6/2002) (CD Regulation) respectively.

Article 1(2) of the EUTM Regulation states that “…A Community trade mark shall have a unitary character. It shall have equal effect throughout the Community: it shall not be registered, transferred or surrendered…save in the respect of the whole Community....” The CD Regulation contains an identical provision at Article 1(3) in relation to the unitary character of CDs.

Given the wording of these provisions, following Brexit, by definition EUTM and CD registrations will narrow in geographical scope and no longer have any effect in the UK. In the event that owners of EUTMs or CDs do not have corresponding UK trade mark or design registrations, subject to any bilateral transitional arrangements that might be put in place, Brexit may leave them devoid of any registered rights. However, unregistered rights could remain, such as the Berne Copyright Convention, which would allow UK companies to enforce certain rights across the EU.

This scenario is unchartered territory, although by analogy there have been a number of instances where the EU has expanded its membership, such as when the Czech Republic, Cyprus and Croatia acceded to the EU. However, while the EUTM and CD Regulations do specifically carve out provisions for what is to happen when countries become members of the EU, the legislation is silent on the effects of a member state leaving the EU.

It is unlikely that the EUTM and CD rights will continue to cover the UK since if they were to do so, such an arrangement would fly in the face of the unitary nature of such rights. One possible bilateral agreement would be for the EU and the UK to give mutually reciprocal recognition of the national and EU wide rights.

Given the absence of a provision in the legislation detailing the impact and effects of countries leaving the EU, a possible option would be for
either the UK or EU to introduce transitional provisions to allow owners of EUTM and CD registrations to obtain corresponding rights in the UK. This was previously seen in 1921 when Ireland left the UK. In this instance, provisions were introduced to enable owners of UK trade mark registrations to maintain their UK mark while also converting the registration into a national Irish mark. This allowed owners to maintain the filing date of their earlier UK registration on the payment of a fee.

A new EUTM Regulation came into effect on 23 March 2016, which brought about various changes, both legally and procedurally, to the EUTM system. The changes proposed in the new regulation have to be adopted by all member states by 2019 and implemented in to their national law. Following the UK’s exit from the EU, there will be no obligation for the UK to adopt the new regulation. However, given that the process of EU trade mark reform has been ongoing for a number of years, it is unlikely that the UK would reject the new regulation and not implement the changes into national law. The implementation of the new EUTM Regulation is a matter that will need to be monitored throughout the negotiation stage.

Brexit will probably result in increased costs for the obtaining of registered rights for trade mark and design owners. It is likely that any transitional provisions, converting a EUTM or CD into a national UK right, would carry a fee, as was the case when Ireland left the UK. Also, given the high prospect that EUTMs and CDs will no longer cover the UK, trade mark and design owners will need to apply to register in two territories, the UK and EU, thereby paying two separate fees to enjoy the same protection as they have under the current system. Further, this cost will increase if Scotland were to separate from the UK after Brexit and then not subsequently re-join the EU (as discussed below), as rights holders might need to obtain a Scottish national right, again to obtain the same protection they currently have.

**Exhaustion and parallel imports**

At present, IP owners can, under the principle of regional exhaustion, prevent the importation and resale into the EEA, which comprises all EU member states in addition to Norway, Iceland and Liechtenstein, of genuine goods which were not put on the market of the EEA by the IP owner or with the owner’s consent (parallel imports). Once the goods are in the EEA with the owner’s consent, the owner cannot prevent their resale and importation across the EEA. This principle of regional exhaustion flows directly from the EU’s principle of the free movement of goods.

It is unclear to what extent after Brexit the UK will restrain parallel imports from the EEA. Much will depend on the extent to which the UK signs up after its departure to the principle concerning the free movement of goods.

**Unitary Patent and Unified Patent Court**

The European patent system is currently being reviewed and the proposed changes are likely to have a significant effect for all users of the current system, with the possible introduction of the unitary patent (UP) and unified patent court (UPC).

The benefits of a UP include the possibility of reduced costs for those who currently, or have future wishes to, acquire European patent protection. The reduced costs are caused by the loss of the high number of translations that are currently needed (one for each country where
languages differ) and the ability to be able to renew the patent for a single annual fee. Under the present system, separate annual fees are required for each country.

Another positive aspect of the UP is that it has the possibility to provide patent protection in 25 out of 28 EU countries (Croatia, Spain and Italy are currently not participating). In the case of a single infringement in any member state, the claimant would be able to recover damages from any EU country where an infringement was present. This is possible through the creation of a new UPC, which would have jurisdiction over all countries who are participating in the UP system.

On 2 March 2016, the Government fully approved the statutory instrument that will implement the UP and UPC in to UK law. This was one of the two statutory instruments required to enable the UK to fully ratify the UPC agreement. Edward Vaizey, Minister for Culture and the Digital Economy, stated that the "new court and patent will be ready for business in early 2017".

Brexit will have little impact on the legality of the UPC and UP system, as it does not need the UK to be a party in order to operate in the long term. As the UK has not fully ratified the UPC and UP system, the decision to leave the EU may mean that the UK never signs up to the new system.

Edward Vaizey has speculated that, "if we left Europe as a result of the referendum, I suspect it would be a decision for the UK Government whether they wanted to re-join the European patent court. Of course, we would have to rely on our European partners to decide whether the UK could be a member."

There will now be a lengthy period of negotiation during which the role of the UK in the UPC and UP system will be uncertain. The UK is currently one of the three countries (along with France and Germany) required to ratify the UPC agreement, therefore during the negotiation period, the UPC and UP system will effectively be in limbo. On the official exit of the UK, it will be replaced by the Netherlands as one of the mandatory signatories of the regime, however again this will not be in the near future.

As with the EUTM and CD system detailed above, patent holders are likely to be impacted by additional costs when the UK leaves the EU, without joining the proposed UP and UPC system. The UK will be an entirely distinct jurisdiction, in which right holders will need to obtain a separate patent registration and therefore pay separate fees.

When the UK leaves the EU, the progression of the UPC and UP system is another area that should be monitored throughout the process of the exit.

Scotland

The Scottish Government has indicated that, if the UK were to leave the EU, it would campaign for another Scottish independence referendum. This will pose even greater uncertainty surrounding the national UK, EUTM and CD system, as well as the UK patent system. There are a number of ways in which this could play out. First, Scotland could remain part of the UK, which would not alter the status quo between Scotland, the UK and EU.

The second option is if Scotland left the UK and then subsequently rejoined the EU. There would be many questions arising from this situation, such as in the interim between Scotland leaving the UK and then joining the EU, would UK national trade marks, designs or patents
extend to Scotland? Also if Scotland were to join the EU, EUTMs and CDs would automatically extend to Scotland. In this case, would Scotland have its own national trade mark, design and patent system and law?

The third option is if Scotland left the UK but then did not join the EU. Again, it would need to be clarified whether UK national trade marks, designs or patents would extend to Scotland. It is likely that similar transitional provisions would be implemented to those that applied when Ireland left the UK in 1921. In any event, it is probable that a Scottish national trade mark, design and patent system would need to be established.

Even though these are important considerations, as stated previously, when the UK leaves the EU it will not be instant but rather a lengthy process of negotiation. The Scottish referendum would be after the definite exit of the UK from the EU, therefore it would not be taking place in the near future. However, this is one aspect that needs to be monitored throughout the Brexit process.

**Conclusion**

As detailed above, there will be a significant impact on UK and EU IP rights and laws. At the moment it is unclear how the rights will be affected and to what extent the scope of current and future rights will be narrowed or altered.

However, there are a number of issues that IP rights holders will need to monitor throughout the negotiating process, as any transitional provisions or decisions on the scope of the protection of rights are likely to have major implications.
15 Pensions

While Brexit will impact pensions law in the long term, there is likely to be little immediate effect on domestic pensions law. The present issue for pension schemes is more economic than legislative. We would expect to see a more gradual evolution of legislation over time rather than an instant change.

The continuing uncertainty in the aftermath of the referendum is likely to negatively affect the financial markets and to continue to do so. For occupational pension schemes, such market volatility would affect scheme funding.

Scheme funding: market volatility

Market volatility will prove a challenge for trustees and administrators of UK workplace pension schemes. The uncertain future is likely to continue to affect the value of the pound and equity markets. As a result, scheme investment performance could be detrimentally affected, leading to a deterioration in scheme funding in the short term.

Trustees of defined benefit schemes should be monitoring their funding position closely. Additionally, trustees should be reviewing their funding strategy to try to safeguard against the market volatility.

The financial impact of exiting the EU on the scheme’s sponsoring employer should also be considered, to determine the risk to the employer covenant. If a risk is identified, trustees may wish to seek additional security from the employer.

Pensions legislation: a gradual evolution

While a substantial amount of pension legislation derives either directly or indirectly from European legislation, this has mostly been enshrined in UK law. Consequently, we do not expect any sudden change to UK pensions law as it stands.

What will change, however, is that UK pensions legislation will no longer be required to be interpreted by reference to EU law or to be subject to the jurisdiction of the ECJ. This should give greater autonomy to UK legislators to re-frame UK pensions legislation in a post-EU context.

While it is not possible to predict post-Brexit policy, it has been suggested that we may see changes in relation to TUPE legislation and GMP equalisation. Legislators will be free to introduce legislation tailored solely to the UK jurisdiction, rather than the supranational, one-size-fits-all approach of EU policy.

Cross-border pension schemes

Leaving the EU and taking the UK out of the scope of the Institutions for Occupational Retirement Provision (IORP) Directive may make participation in cross-border funding arrangements with the UK more attractive. This could give schemes greater economy of scale, with the further benefit of not being subject to the IORP Directive’s funding controls. However, such arrangements could be subject to different funding controls agreed between the UK Government and individual states.
Property ownership

At the moment many UK citizens have holiday homes in European countries, in particular Spain and France. When the UK leaves the EU, in theory UK citizens will be treated like non-EU citizens in relation to these properties, potentially having to apply for a visa in order to visit. If so, this will mean more intrusive questions about various matters including how long they are going to stay, their income and health insurance position. There could also be a risk of higher taxes being applied by EU countries to properties owned by non-EU citizens. These points could in turn make the destination less desirable and lead to a reduction in property values.

However, there can be a great difference between what is theory and what is reality. It may be the case that bilateral agreements will be put in place between the UK and either the EU or individual countries so as to help establish a working system for UK expatriates and holiday home owners. If such agreements are not put in place, the EU’s strict immigration rules could make the ownership and use of such homes difficult or impossible.

In reality, the EU may wish to encourage visitors from the UK and therefore will be open to agreeing more favourable arrangements such as those negotiated with other European but non-EU nations such as Switzerland.

In turn, EU citizens who own property in the UK will face similar issues and potential barriers to ownership if no similar arrangement is put in place.

Healthcare

At the moment an EU citizen can obtain a European health insurance card (EHIC) free of charge, giving them the right to access state-provided healthcare on temporary stays in EU countries at a reduced cost, or sometimes for free. This covers immediate and clinically necessary state-funded treatment including cover for pre-existing medical conditions and routine maternity care, provided the reason for the visit is not specifically to give birth or seek treatment. This may no longer be available.

Taxation and succession

The UK currently has very different tax rules from most European countries, so for the vast majority of individuals the position will remain the same.

However, there is potential for change in certain areas where tax reliefs are currently applied to EU assets as well as UK assets due to the UK’s EU membership. For example, gifts in wills to EU charities are currently free of UK inheritance tax but there is some speculation that this might be restricted to UK charities following Brexit. Agricultural land in the EU can
also currently be inherited free of inheritance tax due to the operation of Agricultural Property Relief and again this could be curtailed so that the potentially valuable relief is limited to UK land. If either of these changes were to come about they would have significant implications for UK taxpayers.

Finally, it is important to mention the European Succession Regulation, which came into effect on 17 August 2015, and affects both UK citizens with property in other EU countries and EU citizens with property in the UK. Its purpose is to provide certainty in cross-border succession situations. The rules are complex, but in terms of which law applies to the succession of their assets a key provision is that an individual can choose that the law of their nationality will apply. The UK has opted out of the Regulation, so individuals with UK-only assets are unaffected, but it is still relevant where UK citizens own property in EU countries. The application of its terms is likely to remain the same but this is still an area of considerable uncertainty so professional advice should always be obtained.
EU public procurement rules

The EU public procurement rules have been implemented in the UK by the Public Contracts Regulations 2015 (along with the Utilities Contracts Regulations 2016 and the Concession Contracts Regulations 2016, which came into force on 18 April 2016). As the UK has voted to leave the EU, although the EU Procurement Directives will cease to apply to UK contracting authorities and utilities, the UK legislation that implements the EU rules will continue to apply unless and until repealed. Given the current scrutiny of the use of public money in the UK and the pressure to use public funds effectively and efficiently, the EU procurement regime principles of seeking to obtain value for money for public sector spending by running some form of competition for works, supplies and services is likely to remain, although the cross border interest test may no longer apply. The UK has actually supplemented the EU Procurement Directives in a number of areas, including specific provisions on ensuring accessibility for SMEs. The Government is therefore unlikely to adopt a wholesale repeal of the legislation. It is also unlikely that simplification of the current UK procurement legislation will be a top priority for the UK Government at this time. Public procurement is likely to remain “business as usual” for UK contracting authorities, while UK businesses competing in the EU may lose the benefit of the application of the EU public procurement rules by EU contracting authorities, although the UK may negotiate a separate trade treaty to give some protection to UK businesses trading in the EU.

EU funding

Many public sector projects and activities involve an aspect of EU funding and public and other bodies in the UK can currently apply for regional and social funding through the European Regional Development Fund and European Social Fund. In the current round of funding (2014 to 2020), the EU has emphasised research and innovation, transport and energy as key areas for the EU’s future where funding is available through the European Structural and Investment Funds. In order to qualify for such EU funding, applicant organisations must be established in the EU so such funding will no longer be available to UK bodies, although a non-EU organisation can still participate as a subcontractor or collaborating partner. Whether Brexit will trigger clawback of any EU funding already granted to UK public bodies (as the recipient is no longer established within the EU) depends on the terms and conditions of each individual grant and whether the EU will seek to enforce the terms of such grant funding.

State aid

The main aim of the EU State aid rules is to maintain a level playing field between competing businesses from different EU member states. The rules do this by seeking to prevent public money from being used to unfairly support or otherwise advantage any business or other trading entity where such support could potentially distort competition and affect
trade between the EU member states. Whether the UK continues to have a State aid regime post-Brexit will depend on the eventual trading model that the UK adopts. For example, an EEA/EFTA model would mean retaining a broadly equivalent State aid regime to that which currently applies to the UK under the EU rules. Even the World Trade Organisation has subsidies rules that the UK would need to comply with if it sought to rely on the WTO regime alone. The issue, therefore, will be whether public authorities in the UK will have to continue to consider the State aid implications of their actions and what effect this will have on competition within the UK.

**Human rights**

As a member of the Council of Europe, the UK Government is a signatory to the European Convention for the Protection of Human Rights and Fundamental Freedoms (Convention). Under the Human Rights Act 1998 (HRA), public authorities and other organisations when they are carrying out functions of a public nature have a duty not to act incompatibly with the Convention. An exit from the EU does not mean that the UK will cease to be a member of the Council of Europe nor cease to be a signatory to the Convention so the repeal of the HRA is a separate issue to exiting the EU. The duty on public authorities is likely to remain in some form if the UK remains a signatory to the Convention.
18 Real estate

While Brexit may result in some changes in the regulation that envelops the sector (see the Environmental and planning section for detail), many of those principles are driven by global concerns not just European red tape. The approach to real estate law in Scotland, England and Wales is already unique and at its heart is not affected by Brussels – Brexit will not change that. The property industry’s concern is thus focused less on law and more on barriers to investment.

There may be a hiatus in the commercial market, while new trade agreements are negotiated and businesses come to terms with the new order.

A recent CBRE survey highlighted concerns that outside of the EU, Britain would lose its status as Europe’s top choice for commercial property investment, if trading across borders becomes more difficult, the banks become more cautious or London loses some of its appeal as a financial centre. Conversely many key UK based investors have European funds that may be indirectly affected by Brexit and are already taking a more cautious approach to new investments or even placing a moratorium on them.

The other side of the coin is the potential effect on trading within Britain – if retailers struggle to trade then their property base will inevitably suffer, potentially hitting the sheds, estates and high street markets. The boom seen in leisure, student accommodation and PRS (the private rented sector) may also suffer if it becomes more difficult to move around Europe. 54% of the hotel professionals surveyed in the European Hotel Market Survey believed that M&A activity and/or RevPAR (revenue per available room) would be adversely affected by a Brexit – piling on the pressure already existing from the rise in non-traditional accommodation such as Airbnb. This prediction is in turn backed by researchers at Credit Suisse, who have forecast an initial fall in house prices on the back of weaker incomes followed by, in the medium term, a drop in housing demand because of lower immigration and the change in the UK’s status as a financial hub.

What is clear is that the real estate market flourishes in a stable, growing economy, be that inside or outside the EU.
Regulatory law in the UK has a broad scope. Approximately 50 statutory bodies are established with competency to regulate activities ranging from financial services to food standards, nuclear power to nursing. EU law permeates the regulatory spectrum to varying depths.

The Coalition Government’s deregulation agenda continues to develop under Conservative leadership, with rumours of a move from a “one in two out” to a “one in three out” policy towards secondary legislation; for every new measure that is introduced, measures amounting to three times its financial impact would be repealed. To the extent that EU membership imposes pressure on policy-makers to introduce new regulation, Brexit may help facilitate the implementation of the deregulation agenda in the UK.

While new EU regulations and directives will have no direct impact on an independent UK, it is likely to prove impossible and even undesirable for the Government to abolish a significant amount of EU law in many areas of regulation.

The health and safety regime is one of the more substantial areas of regulation in the UK and is indicative to a large extent of the way in which EU and UK law interacts. We take a closer look to illustrate some of the issues and implications of Brexit for regulatory law.

The UK’s health and safety regime is one of the most robust and successful in the EU, with workplace fatalities lower than any other member state in 2012. The regime is overseen by the Health and Safety Executive (HSE) and is built on the Health and Safety at Work etc Act 1974 (HSWA), which imposes broad general duties on employers and provides a framework within which many pieces of subordinate legislation have been introduced to fill out the detail.

HSWA predated the EU Occupational Safety and Health (OSH) Framework Directive, which was adopted in 1989. Although many secondary measures have since been enacted that overlap with and implement EU requirements, these have largely been made under HSWA rather than under the European Communities Act 1972 and will therefore not be subject to automatic repeal.

The HSE has put forward a number of suggestions to the European Commission (EC) for streamlining health and safety legislation, as part of the EC’s evaluation of 24 OSH directives, which was undertaken between 2012 and 2015. These suggestions included a number of amendments to and repeals of existing directives that were felt to be overly cautious or inflexible in view of the UK’s well-regarded proportional risk-based approach to regulation. An independent UK will give the Government a free hand to act on the HSE’s recommendations in these areas, without the need to negotiate with other member states.

However, the UK has on occasions adopted higher standards than are required by EU legislation, for example around asbestos (a practice known as “goldplating” as opposed to the “copy out” approach to implementing EU directives). In these areas, it is Government policy that has a bigger impact on health and safety regulation than EU policy and
Brexit is unlikely to prompt a reduction in standards. It is suggested therefore that the health and safety regime would remain largely unchanged, providing industry with a degree of compliance and cost certainty in respect of continuing health and safety obligations.

Similar conclusions could be applied to many other areas of regulation, for example consumer law; the Government made a recent indication of intent in the Consumer Rights Act 2015, which implemented aspects of a number of EU directives and regulations but had wider aims of consolidating and clarifying consumer protections. Brexit will be unlikely to involve winding back the clock on this policy.

Ultimately it is not realistic to imagine that the perceived burden of EU regulation will simply be allowed to fall away following Brexit. In the first place, much regulatory law at EU and national level exists for good reason, as discussed above. Secondly, the many areas of EU regulation that affect imports and exports, for example the exacting standards of the REACH Regulation, would have to be continually applied by national businesses if the UK was to continue to trade with the EU; the internal market accounts for an estimated 45% of all UK exports. However the Government chooses to legislate following Brexit, it is clear that compliance with EU regulation will remain a commercial necessity in many arenas.
20 Restructuring and insolvency

English insolvency and restructuring law and procedures are significant at both the European and world level. In recent times lenders, debtors and many others have sought to take advantage of the varied, flexible and fair procedures available in our jurisdiction. This has resulted in a flow of individuals from countries such as Ireland and Germany seeking to make themselves bankrupt in the UK to take the benefit of what is deemed a more restorative and entrepreneur friendly process, while at the same time the courts have taken a pragmatic, commercial view towards expanding the availability of the scheme of arrangement process to companies with only limited connections to this jurisdiction. It remains to be seen what impact Brexit will have on these positions and others; the terms of an exit will be key to understanding what impact there may be on the insolvency and restructuring world but it is likely that in the short term the UK will not be seen as quite the safe haven it currently is.

In the early part of this millennium the EC Regulation on Insolvency Proceedings (ECR) was introduced and immediately changed the world of cross-border insolvencies within Europe, providing a mechanism for the recognition, structuring and interrelating of different insolvency processes across the continent applying to the branches of the same company; it is scheduled to be recast in 2017. Subsequent legislation was also introduced to cover areas not covered by the ECR in respect of credit institutions and insurers. These three pieces of legislation were introduced by way of Regulation and therefore on Brexit, the UK will no longer be a party to this legislation and, without anything further, will be forced to rely on a mish-mash of existing laws with each separate member state. It seems likely therefore that the Government will seek to replicate the position under ECR (and the other regulations) where it can directly with member states, although how quickly and easily this can be achieved following Brexit is open to debate.

It is important to note that, as schemes of arrangement are not included within the ECR, this thriving area of UK law will not be directly impacted and the position may even be made more straightforward by the dis-application of the European Judgment Regulation, which has been a material issue in recent cases.

One possible benefit of Brexit could, however, be that the UK may no longer need to be involved in the ongoing project to harmonise certain insolvency laws in the EU.