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## *UK Votes for Brexit – Key Considerations for International Businesses*

On 23 June 2016, in public referendum, the British public voted in favour of the UK leaving the EU (“Brexit”). As a result of the uncertainty caused in the run up to the referendum, the financial markets and transactional activity in the UK has been markedly lower this year. This uncertainty will now continue for a number of reasons.

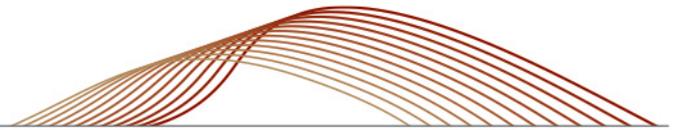
Firstly, the question posed at the referendum decided that the UK should leave the EU, but it did not (and did not have the power to) determine how that exit will occur or the nature of the UK’s relationship with the EU following Brexit. This will be the first time that a significant member of the EU has left and there is no detailed mechanism in the treaties establishing the European Union for a member to exit.

Article 50 of the Treaty on the European Union requires a member state which wants to withdraw from the EU to notify the European Council of its intention to secede. The referendum result in the UK does not constitute such notice and the timing of service of such notice is likely to be a matter of intense political discussion in the UK in the coming weeks or months. Following service of an Article 50 notice, a withdrawal agreement between the UK and the EU will then need to be negotiated. Brexit will occur on the earlier of the date of the UK withdrawal agreement or the second anniversary of the notification to the European Council (unless all remaining member states agree to extend this period).

There is no clarity on the trading arrangements which will apply in respect of the UK after Brexit: as part of the Brexit negotiations, Britain will undoubtedly seek to arrange an appropriate free trade agreement with the EU. However, other European countries which have free trade agreements with the EU have also been required to accept certain fundamental EU principles, such as free movement of workers and, given that immigration into the UK was one of the principal concerns of those in favour of Brexit, it remains to be seen whether a free trade arrangement can be agreed between the UK and the EU. In addition, following Brexit, the UK will be unlikely to benefit from the free trade agreements which the EU has entered into with many countries worldwide and it will need to negotiate new free trade agreements with countries outside the EU.

Accordingly, the precise impact of the Brexit decision on the UK as a place to do business and on the UK legal system will likely take at least two years, perhaps longer, to determine which will only become clearer as the negotiations surrounding Brexit progress.

This client alert contains Paul Hastings’ analysis of the possible impact of Brexit on key areas of UK law which are likely to be of concern to our clients.



## **Mergers and Acquisitions/Corporate Law**

### ***Private Mergers and Acquisitions***

From a legal perspective, private mergers and acquisitions (“M&A”) are unlikely to be affected by Brexit because, firstly, any EU Directives or regulations directly affecting this area of law require implementation into UK law in order to have effect and secondly, the documentation relating to M&A are reliant on English law and the exclusive jurisdictions of the English court. Brexit does, however, result in some practical and commercial implications on existing and potential deals.

Clients are advised to commence due diligence of existing contractual arrangements to consider whether any contractual rights arise on a Brexit; for example, is Brexit a material adverse change? Other provisions to review as part of such due diligence exercise include financial covenants, events of default/termination rights, ratchets and force majeure.

Contracts governed by English law, will be interpreted in accordance with the general principles of English law. The courts will consider the intention of the parties in relation to the terms of the agreement if the meaning of the relevant provision is not clear from the drafting. For example, if a material adverse change clause is drafted in a broad general nature then it is unlikely that Brexit would enable the bidder or the purchaser to rely on such a clause to terminate the agreement as either (i) the effects of Brexit would not be deemed specific enough in the context of the relevant transaction; or (ii) such a general market risk may have been expressly carved out from a general material adverse effect clause.

On the other hand, if the material adverse change clause is drafted to target a specific business in a specific sector or geographic location, then there is a higher risk of the material adverse effect clause being invoked by either the bidder or the purchaser. Alternatively, the material adverse effect clause may specifically make reference to Brexit. Under both circumstances, the courts would be more inclined to conclude that it is the intention of the parties that Brexit be deemed as a material adverse change.

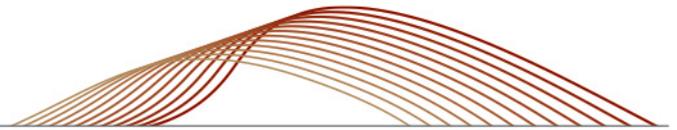
### ***Public Mergers and Acquisitions***

Any proposed acquisition of a UK public company is subject to the UK Takeover Code. Although the UK Code implemented the EU Takeovers Directive, the Directive itself contains a large number of UK specific rules and has over time adapted to both UK and global market conditions. It is, therefore, expected that these rules will continue substantially in the same format. There may be some amendments to the UK Takeover Code to reflect Brexit and adapt to the shift in the market, however, we consider it unlikely that Brexit would prompt dramatic changes to the UK takeover rules.

## ***Company Law***

### ***Legislation***

The Companies Act 2006 is the main piece of legislation governing the incorporation and operations of UK companies. Some of the provisions, albeit a minority, derive from EU Directives, such as the Company Law Directives, the Shareholder Rights Directive, the Transparency Directive and the EU Accounting Directives, which could be repealed. These provisions may be reviewed now the UK has voted to leave the EU but we would not expect a radical overhaul to be made. Companies are unlikely to experience a high impact in terms of operative and administrative matters such as the M&A process but over time there may be an increase in divergence between EU and UK company law; indeed the UK Government may seek to further liberalise the law in this area to enhance the UK’s reputation as one of the most attractive jurisdictions to establish a company in.



## ***Cross Border Mergers***

Assuming that Brexit takes the form of a total exit from the EU and the EU single market, the EU Cross Border Mergers Directive, which has been enacted into UK legislation which allows mergers between companies incorporated in different EEA states provided that the merger consists of companies from different EEA member states will most likely cease to be available in the UK. Under such framework following Brexit, such mergers will no longer be possible as the UK would fall outside of the definition of EEA member states.

## ***European Companies***

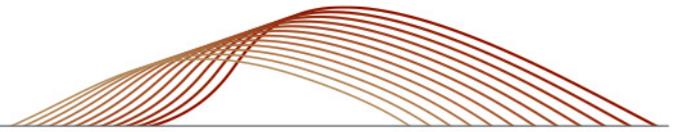
The European Company Statute allows a company, a European public limited company (Societas Europaea (“SE”)) subject to EU-wide laws, to be formed in any EU member state. Although such entities have not proved to be that popular, all existing SEs whether incorporated in the UK or not will be affected now the UK has voted in favour of leaving the EU. These entities should consider whether they are currently located in the optimal jurisdiction in light of their medium to long term strategy and to utilise the mechanisms available to them prior to Brexit should they wish to move because the SE Regulations will cease to have effect in the UK.

## **Capital Markets/Securitisation/Bank Lending**

It is difficult to accurately predict at this stage what the consequences of Brexit will be for UK based financial institutions involved in arranging and providing cross-border financing either through the capital markets or direct lending given the envisioned two year period to negotiate the United Kingdom’s exit from the EU. However, given the fundamental underpinning that EU legislation gives to this area there will undoubtedly be a significant impact. What should be noted is that the majority of the EU legislation incorporates the concept of access to the EU by “third country” institutions (i.e. non-EU institutions). Therefore, subject to any negotiated regime as part of the Brexit settlement, to continue to interact with EU entities, the UK may need to create and maintain a regulatory environment at least “equivalent” to that of the EU to access the EU markets as a third country.

One example of the above relates to one of the most important pieces of legislation from a financial institutions perspective being the Markets in Financial Instruments Directive (MiFID). MiFID is fundamental to the ability of banks and non-bank investment institutions to conduct activities across the EU including the trading of securities and derivatives, underwriting, and portfolio management. A key part of the legislation is the ability, known as “passporting”, for such institutions to conduct business throughout Europe without obtaining a licence or similar in each individual country. It remains to be seen whether reciprocity is established or whether financial institutions in the UK will be treated in the same manner as other third country entities which cannot make use of passporting and must instead establish an authorised presence in the particular jurisdiction in question.

A similar situation will arise with respect to the Capital Requirements Directive which affects deposit-taking institutions conducting services such as deposit-taking, lending and participation in securities issues. Securities issuances currently based on the prospectus directive and the transparency directive will also be affected and potentially an equivalent regime will need to be established within the UK. The manner in which the UK will fit in with the proposed Capital Markets Union that is currently being planned by the EU and the planned changes to the EU securitisation regime are also up in the air. EU regulations as to custody arrangements, trade reporting and clearing (particularly of Euro denominated securities), currency indices benchmarking, capital requirements and risk retention will all need to be considered as part of Brexit. In short there are very few areas of a UK based financial institution’s activities across the EU that will not need to be re-considered when it comes to Brexit.



## ***Prospectus Passporting***

Similar to the licensing to practice business throughout Europe, once a prospectus (offering circular) in relation to an offer to the public of equity or debt securities has been approved by a single member state of the European Union, such prospectus can be used to offer such securities to the public throughout the EU in accordance with the Prospective Directive. As the UK has voted to leave the EU, this automatic approval within the EU would cease to apply making it less straightforward and more expensive for UK issuers to offer securities elsewhere in Europe. The practical effect of Brexit will depend largely on the arrangements made between the UK and the EU which themselves be also be influenced by how consistent UK legislation will be with EU Regulations and what reciprocity is established.

## **Real Estate**

The uncertainty that has characterised the debate surrounding Brexit to date may well continue, in particular during the expected Brexit negotiation period. Some investors may defer any major investment decisions regarding their real estate allocations until a deal is concluded whilst other investors may accelerate and implement the pre-planned strategies they have put in place for a Brexit scenario. Opportunities may be created for faster moving opportunistic players.

Occupier demand may reduce if organisations do indeed elect to relocate from the UK (or significantly downsize) to mitigate any loss of so called 'passporting' benefits. In turn this could lead to increased vacancy but reduced rents and less rental growth.

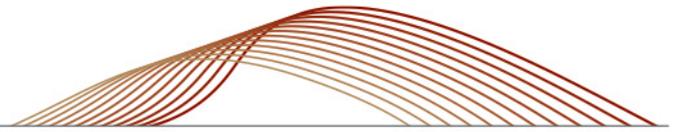
However, a contrary view is that the ensuing uncertainty may create opportunities in the short term and potentially result in a short term boost for the UK property market. Sterling depreciation could increase demand for UK real estate from some foreign investors who have historically suffered from the high barrier to entry created by the strength of Sterling and it may seem unlikely that a vote for Brexit would alter the view of the UK commercial property market (particularly in London) as a safe and stable investment proposition likely to retain its attraction to the international market.

It may also be arguable that the potential loss of free movement for workers could impact the construction and hotel industries as a result of reduced availability of appropriately qualified workers and, from a cost perspective, on the availability of materials at their assumed cost base. Cost overrun provisions in works documentation should be analysed.

## **Private Funds**

The most obvious effect on the funds industry relates to The Alternative Investment Fund Managers Directive (AIFMD), the first piece of EU legislation to focus directly on this sector. Assuming the UK separates entirely from the EU (ie it doesn't remain in the European Economic Area (EEA) with a similar status to Norway) then the UK will become a third country for AIFMD purposes and the marketing passport into Europe will no longer be available to UK managers. UK Alternative Investment Fund Managers (AIFMs) may want to try to market their next fund before the separation is complete and will need to keep a close eye on what transitional arrangements are put in place for Alternative Investment Funds (AIFs) already in the market and fully passported prior to the date of Brexit.

The alternative for UK based fund managers will be to rely on each EU State's national private placement regimes but these can be very inflexible and in some countries marketing a non-AIFMD fund is practically impossible. The UK will no doubt seek to obtain equivalency status for its funds and reach an agreement with the EU that marketing by UK AIFMs will be permitted but there is no guarantee how long this would take to negotiate and agree. At some stage countries may start to wind down their private placement regimes which will make the situation even harder. Similarly,



the European Venture Capital Funds (EuVECA) regulations will cease to apply to UK managers preventing venture funds from enjoying a similar passport to AIFMD funds.

Larger fund management groups will no doubt instead establish AIFMD compliant platforms elsewhere in the EU, in particular in Luxembourg or Ireland, while retaining their head office in London. Many have in fact already done so, but for smaller fund managers this may be too difficult a step. Particularly hard hit will be UK based fund managers who were sub-threshold but voluntarily sought, and invested a great deal of time and money in obtaining, fully regulated AIFM status in order to improve their marketability across the EU.

Leaving the EU many not lift the regulatory burden of AIFMD either. The provisions of the Directive are already part of UK law and it is unlikely the FCA will remove these additional regulations in the short term. Indeed the UK has always regulated fund managers to a higher degree than most EU states and if it is to seek regulatory equivalent status for UK funds it will need to keep the regulations fully intact.

Departing the EU will mean that UK direct lending funds may escape the proposed EU wide regulation of this asset class. This is some years away and it's difficult to know how burdensome these rules might be. There is always the concern that, as with AIFMD, some form of equivalency is likely to be required if those funds want to do business in the EU as well.

For many funds focussed on the SME sector the European Investment Fund (EIF) has been a cornerstone investor. The presumption must be that the EIF will no longer invest into UK focussed funds after Brexit has completed, and it may not commit to such funds now. It remains to be seen whether the UK Government will take steps to replace that source of funding and what conditions might apply to any funding. There is already expertise to manage such a scheme within organisations such as the British Business Bank but whether such a level of investment by the Government is politically or economically justified remains to be seen.

## **Employment**

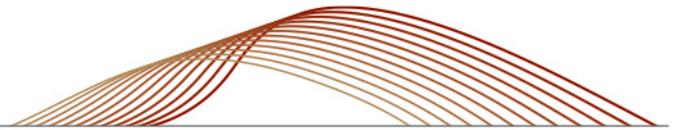
The vote for Brexit does not immediately revoke great swathes of UK employment legislation. Most UK employment laws derived from European Directive were implemented into UK law by local legislation that continues to apply. However, there is now an opportunity for the government to consider which of this specific legislation it wishes to retain, amend and / or revoke.

### ***Global Mobility***

Regaining control of the UK's borders was a fundamental factor for many voting yes to Brexit. It does, however, have widespread practical implications for any business which employs EU citizens to work in the UK or vice versa, who have to date benefited from the flexibility which membership to the EU provided in terms of freedom of movement. It is unlikely that changes to immigration, particularly in relation to EU nationals working in the UK, will be implemented overnight, due to the inherent complexities and extensive impact this would have on business. We anticipate the negotiation of transitional arrangements.

### ***Discrimination***

The Equality Act 2010 is an example of UK legislation derived from EU Directives. Although this legislation will not therefore fall away as a consequence of Brexit, there is scope for the government to amend this in such a way that it departs from the ever expanding concepts under European law. For example, there could be scope to reinstate the cap on compensation for compensatory awards (removed following the *Marshall* decision from 1993), whilst concepts such as 'associative discrimination' recently seen in the European Court of Justice case *Chez* could no longer be relevant.



## **The Transfer of Undertakings (Protection of Employment) Regulations 2006 ("TUPE")**

TUPE is widely considered one of the more complex pieces of employment legislation within the UK, and for this reason has been relatively unpopular. Consequently, this legislation could be one of the first to come under scrutiny. That being said, TUPE has become an integral piece of legislation, widely relied upon by businesses across the UK. For example, some business models operate on the basis TUPE will apply in set circumstances (in particular, outsourcing arrangements), and it is often therefore factored into pricing structures.

If changes are to be made here, they are likely to be in relation to the restrictions on dismissing employees and / or harmonising terms following a TUPE transfer, and potentially in relation to consultation requirements so as to make the legislation more business friendly.

### ***Working Time Directive and Holiday Pay***

The EU Working Time Directive has been implemented in the UK under the Working Time Regulations 1998 ('WTR'), and so whilst this will remain legally binding (for the time being), a number of important recent ECJ rulings which have been binding on the UK courts and consequently resulted in increased employee rights, will not be. For example, the rulings in recent years (which many employers have just been getting to grips with and implementing) such as the decision that holiday should still accrue whilst employees are on long term sick leave, and the finding that commission and guaranteed overtime payments should be factored in to the calculation of holiday pay, may now be subject to re-consideration and challenge.

### ***Financial Services Employers***

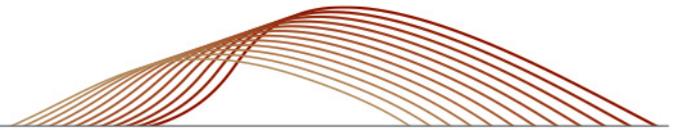
In 2013 the U.K. mounted a legal challenge against the EU's cap on bankers' bonuses contained in the Capital Requirements Directive. Under this directive, bankers' variable pay must not exceed 100 percent of their fixed remuneration in a given year, or 200 percent with agreement of the bank's shareholders. In 2014 the U.K. was forced to withdraw this challenge. Of all sectors that will be impacted by Brexit, international employers in the financial services sector are likely to be the most. There could be not only a sea-change in regulation applicable to these businesses and their employees, but also a change in the location of the workplace in the event there is an exodus of financial services employers from the U.K. to the Eurozone.

### ***Data Protection***

EU-derived data protection laws impact how the international employer transfers HR data out of the EU. Although the government may now be free to implement such revised data protection rules as it sees fit, and the General Data Protection Regulation (which is due to come into force in 2018) would have no application in the UK, in reality, from an international perspective, the UK is likely to require privacy protections which are at least as favourable as that in the EU.

### ***Future for UK Employment Law***

The impact that a Brexit would have on UK employment legislation depends to a great extent on the nature of the withdrawal from the EU and the negotiations. There are various possibilities which the UK, and Europe, may consider. For example, remaining a European Economic Area/European Free Trade Area state, as Norway, Iceland and Liechtenstein have done. This would likely minimise trade costs, but at a cost - the UK would remain subject to much of the EU legislation, but with no voice in the decision making process and no right of veto. Politically, this option is likely to be extremely unpopular, and does not afford the government independence from the EU legislation or the European Court of Justice. Significant changes could be on the way, and employers would be well advised to watch this space for developments.



## **Tax**

It is important for international investors to consider the tax implications of Brexit from the EU.

### **VAT**

VAT legislation has been harmonized across the EU through a series of EU Directives. Following Brexit, the UK would no longer be bound by EU law and could change how VAT is charged in the UK, or even replace VAT with an entirely different tax. We do not anticipate any changes in the short term.

Whilst the UK would not be bound to follow EU VAT legislation, any modifications to existing EU law would impose additional costs on UK businesses as a result of applying different systems, and would increase the risk of taxpayers being subject to double-taxation.

### ***ECJ Jurisprudence / Stamp Duty Reserve Tax (SDRT)***

There is a question mark in relation to whether the UK courts would be bound to follow ECJ jurisprudence, and to the extent that the UK courts do not follow the ECJ jurisprudence, this could lead to additional layers of complexity.

A charge to SDRT is imposed at the rate of 1.5% on issues of shares and securities to depositary receipt issuers or clearance service services, in certain circumstances. Following ECJ case law, HMRC no longer seeks to impose this charge. Following Brexit, this charge could arguably be levied.

### ***Customs Duty***

Following Brexit, the UK would cease to be part of a customs union. In the absence of a new free trade agreement between the UK and the EU, imports into the UK and exports to the EU would be subject to customs procedures. In addition, in order to retain the advantages it currently enjoys under the EU's free trade agreements with other countries, the UK would likely need to negotiate new free trade agreements with non-EU member states.

### ***Withholding Tax***

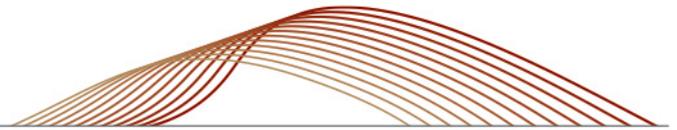
EU Directives provide for tax exemptions on cross border dividend, interest and royalties payments made between related companies located in different Member States. In the case of Brexit, an EU Subsidiary making such a payment to a UK Parent (and potentially vice versa) would not be able to rely on these Directives to make payments free from withholding tax, and would have to rely on domestic exemptions and reliefs under double taxation agreements.

### ***State Aid***

Post Brexit, and were the UK also to leave the EEA, the UK would not be bound by EU law restrictions with respect to State Aid. The government or any public organisation would not be prohibited from using state resources (such as a more favorable tax regime) to provide an advantage to any organisation.

### ***Social Security Rules for Cross-Border Employees***

Under EU law, an individual is subject to the social security laws of one Member State only. Following Brexit, workers could be subject to social security contributions in both the UK and the EU member state in which they are working, e.g. if the individual is working in more than one EU member state.



## Litigation

European Union law has touched on litigation in the UK courts in two main ways. First, the rules on jurisdiction and recognition of judgments and the service of process in other EU member states are governed by Regulation No 1215/2012 of 12 December 2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (recast) (“Brussels Regulation Recast”) and Regulation No 1393/2007 of 13 November 2007 on the service in the Member States of judicial and extrajudicial documents in civil or commercial matters (service of documents) (“Service Regulation”). Second, the question of the applicable law in relation to contractual and non-contractual obligations are governed by Regulation No 593/2008 of 17 June 2008 on the law applicable to contractual obligations (“Rome I”) and Regulation No 864/2007 of 11 July 2007 on the law applicable to non-contractual obligations (“Rome II”).

Leaving the European Union will mean that these Regulations will no longer be part of UK law, although the impact will be different in relation to the Brussel Regulation Recast and the Service Regulation compared to Rome I and Rome II.

The Brussel Recast Regulation provides for the allocation of jurisdiction and a mutual recognition regime between the courts of member states, whereby a court in a member state will not take jurisdiction over a dispute where the dispute is already before the court of another member state (save where there is an exclusive jurisdiction clause in favour of the first member state). Further, a judgment of a court in one member state will be recognised with minimal formality by the courts of other member states. In the absence of the Brussels Recast Regulation, there would be no certainty that a court in another member state would respect the jurisdiction of a UK court if it had taken jurisdiction over a dispute and the recognition of judgments of UK courts may be significantly more difficult and time consuming.

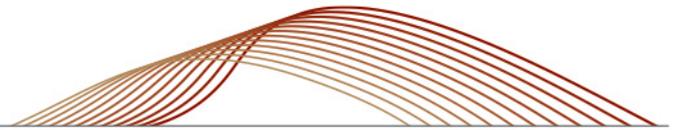
The Service Regulation is designed to simplify the process of serving proceedings commenced in one member state in another member state by providing a mechanism for the authorities in member states to effect service on behalf of the authorities in another member state. This simplified mechanism will no longer be available in the absence of the Service Regulation and so parties will need to ensure that they serve documents correctly under the laws of the member state where a defendant resides.

Rome I and Rome II provide for common rules for determining the applicable law for contractual and non-contractual obligations. With these regulations no longer being part of UK law, the UK courts will instead determine such questions on the basis of UK specific rules. However, it is likely that in many cases the UK specific rules will be the same as, or similar to, the rules under Rome I and Rome II. Further, courts in member states will continue to apply the rules under Rome I and Rome II, which in almost all cases respect the choice of the parties. Therefore, the choice of English law to govern a contract or a non-contractual obligation will continue to be respected by the courts of the remaining member states.

Whilst the above summary assumes that the regulations will no longer apply in the UK, there is scope for the negotiation between the UK and the remaining member states to lead to these regulations continuing to apply with respect to the UK or for similar instruments to be applicable (e.g. the Lugano Convention that replicates the provisions of the Brussels Recast Regulation for Switzerland, Iceland and Norway), so that in practice there may be no material change to the regime between the UK and member states.

## Restructuring & Insolvency

The UK’s decision to leave the EU is likely to result in considerable uncertainty for future cross-border restructurings in this jurisdiction. Indeed, although transition measures are expected to be



put in place, without agreement on the continued recognition of UK judgments in Member States after Brexit, market participants may need to re-consider the suitability of UK restructuring and insolvency procedures, as well as English law documentation and structures, to address multi-jurisdictional situations in the future after Brexit.

However, the UK's decision is also likely to result in new opportunities for distressed investors. In particular, the anticipated fall in the value of sterling, together with increases in taxation as part of government's envisaged further fiscal austerity measures, are likely to impact the liquidity of consumer exposed companies, as well as already distressed companies that have not been able to refinance or restructure as a result of restricted credit supply issues in the lead-up to the UK's decision.

In addition, the economic impact of this decision may lead to covenant breaches and/or payment defaults (particularly where companies are reliant upon foreign exchange conversions to meet their liabilities) or are likely to be burdened with greater regulatory costs, which could lead to higher numbers of restructuring/distressed investment opportunities. Moreover, the possible reluctance of banks and other financial institutions to support, or continue to support, distressed UK companies facing severe liquidity issues, an uncertain legal landscape and potentially restricted access to key EU markets is also likely to present further opportunities for new opportunistic investors to enter the marketplace in due course as companies actively try to deleverage balance sheets and access new funds in order to continue to compete with their EU counterparts.

## **Regulatory and Data Privacy**

Given the importance of the financial services industry to the UK, and supposing the UK Government begins exit discussions immediately, the next two or more years of negotiations between the UK and other EU Member States will be the subject of intense scrutiny and debate.

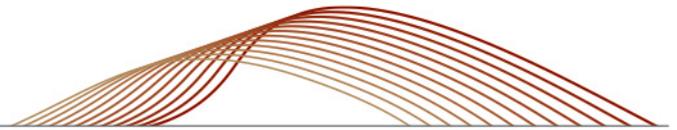
### **Impact of EU legislation**

A significant amount of existing financial services legislation has EU law as its foundation. The process to decouple UK legislation from EU implementing directives, regulations, regulatory technical standards and opinions would be long and arduous. Depending on the UK's future relationship with the EU (e.g. if the UK wishes to re-join the EEA), it may still nonetheless have to implement EU laws notwithstanding the fact that it has no influence over the content.

### **Access to the Single Market**

Following Brexit, the UK would clearly no longer be a member of the EU and would not form part of the "single market" for financial services. In particular, UK firms would lose the ability to "passport" their services into other EU countries. As negotiations progress, the UK may seek to regain access to the single market by demonstrating the "equivalence" of its laws and/or create a two-tiered approach which sees one regulatory regime applying to firms wishing to trade with EU countries and another for the rest of the world. Whilst negotiations unfold, financial services firms should start to consider options for restructuring their operations, with a particular focus on the best model for continuing to do business in the EU. More generally, firms should be reviewing their key existing contracts to assess how Brexit would impact the jurisdictional scope of their contractual obligations, and how to address changes in regulatory requirements.





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