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The dust slowly settles - Brexit and your business

On 23 June 2016, the UK voted in favor of leaving the European Union. The outcome of this historic referendum will lead to intensive negotiations between the UK and EU to reach an agreement on the terms of withdrawal from the EU. The outcome of these talks will determine the future relationship between the UK and the EU and the extent to which the UK is bound by EU laws and regulations.

The UK and Ireland are so closely related that Brexit will have a significant impact on Irish companies doing business in and through the EU.

It is difficult to predict what lies ahead for the UK, Ireland and the EU. However, it is clear that exiting the EU will be a lengthy process for the UK.

Many of the key changes to the commercial and legal environment will evolve gradually over time. In the meantime, there are many unknown factors that make it difficult to foresee the outcome of Brexit or the precise effect the referendum will have on Irish companies.

This brief aims to assist you in identifying the issues arising from Brexit that will affect your business.

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Possible Outcomes of Brexit

Negotiations will determine the new trading and institutional relationships between the EU and the UK. There is huge uncertainty surrounding what they will be and how long they will take to negotiate.

There are five main options for the UK to choose from which all will have different effects on business in Ireland.

The options are as follows:

- Join the European Free Trade Association (EFTA)

  The UK could agree to a relationship with the EU similar to that which it has with Switzerland. Countries in the EFTA must abide by a considerable amount of EU legislation despite them having no input into drafting such laws or policies. This would lead to a minimal impact on Irish businesses and their trade with the UK. Should the UK join the EFTA, once the legal and practical elements of the arrangement are agreed between the UK and the EU, it is likely that any uncertainties would pass in a relatively short space of time

- Join the European Economic Area (EEA)

  The UK could join this area of free trade and free movement of persons comprising EU Member States and Norway, Iceland and Liechtenstein. It would stay within the single market for goods and services but would be obliged to contribute towards the EU budget and apply EU law related to the single market in its domestic legislation without having a vote or influence over the creation of these laws.

- Establish a Customs Union with the EU

  The UK could create a customs union with the UK or at least strike a comprehensive free-trade agreement with the EU, similar to Turkey. Again however the UK would have to apply EU rules and regulations in the customs area without directly influencing the drafting of these rules at an EU level.

- World Trade Organisation

  The UK could rely on WTO rules for access to the EU market. This is the default position should no trade deal be struck with the EU on the UK’s departure. The WTO rules provide that each member of the WTO must apply the same market access rules to all members (the most favourable nation) including tariffs.

- Other Deal

  The UK could negotiate a special deal that allows it to retain free trade with the EU but avoid the disadvantages of the other models. However, this may be extremely difficult to negotiate in the current post-Brexit atmosphere.

  The cold reception Brexit has received from certain EU Member States means negotiations could result in some Members insisting that the UK does not benefit from its withdrawal in order to deter other countries from following Brexit.

  The worst outcome would be the imposition of tariffs and other barriers to trade which would seriously impact on the flow of goods and services between the UK and EU, including Ireland. The free movement of capital and people would also be caught by these restrictions which would have a significant effect on Irish companies.

Key Issues Arising From Brexit

a) Competition Law

- As the UK will no longer be governed by EU State aid rules, it is likely that UK rules will favour national businesses over other businesses operating in the UK. This is likely to be disadvantageous for Irish businesses with regards tax breaks and incentives.

- The UK is likely to continue to prohibit anticompetitive agreements and abuse of a dominant position albeit under its own regime. This would lead to competition law being interpreted differently by the UK and EU Member States which could cause difficulties for companies operating in both the UK and EU Member States. Companies could be subjected to two sets of investigations in respect of the same alleged misconduct which could prove costly in terms of time and money.

- The UK will no longer be governed by the EU procedure for reviewing mergers. Mergers connected with the UK may have to secure separate clearance for the merger from UK authorities. This may prove costly in terms of time and money. Should a merger be approved in the EU but not the UK (or vice versa), the outcome is unclear.

b) IP and Data Protection

- Community intellectual property rights such as registered and unregistered community designs and EU trade marks (previously community trade marks) may no longer be protected within the UK once it leaves the EU. This could de-value the trademark or even the entity which holds it. If this is the case, companies may have to apply to register new rights separately in the UK. Pan-European injunctions based on EU Trade Mark rights would no longer cover the UK. Applications for injunctions post-Brexit would require the EU Trade Mark owner to bring two sets of proceedings where an infringement is occurring in Ireland or any other EU member state and in the UK.

- It is unclear whether the transfer of data to the UK under EU rules could be carried out due to cross-border transfer of data issues. At present data may be transferred to another EU member state. However, data may not be transferred outside of the EU unless the destination country has adequate protections for that data and an agreement with the EU to ensure it maintains that level of protection. The UK would be required enter such an agreement with the EU similar to the "*EU-US Privacy Shield*" pact between the EU and the United States.

- The General Data Protection Regulation 2016 will not apply to the UK. The practicalities of the UK and EU having different data protection regimes will mean that companies operating in Ireland and the UK will have the extra burden of ensuring compliance with both regimes, rather than just the present EU regime.

c) Data processing Outside the EU

- New measures will be required for data to flow between the UK and EU.

- The transfer of data outside the EU is generally only allowed where the recipient of the data is seen as a 'safe third country' by the European Commission. Whether the UK will be regarded as a 'safe third country' remains to be seen. If it is not, Irish companies doing business in the UK would need to adjust their approach to data protection compliance.

- EU businesses wanting to transfer personal data to the UK will need to ensure that such transfers are in compliance with UK laws.

- Businesses transferring data from the EU to the UK need to consider what alternative options could be put in place to ensure that there is adequate protection for the personal data being imported.

- It is possible that processing within corporate groups that is currently considered fair and lawful now may not be considered to be fair and lawful under UK laws following Brexit.

- The UK will be bound by the EU's General Data Protection Regulation (GDPR), although it is unclear for how long. GDPR will cease to apply when the UK exits the EU. In the long term, the UK could depart from GDPR and create its own system for updating its data protection laws. However, its application is likely to continue after the UK leaves the EU so companies should continue to prepare for its introduction.

d) Tax

The UK will look at their corporate income tax, withholding tax and other taxes in order to make more attractive for foreign investment to compensate for its not being in the EU. The imposition of additional customs duties and value added tax burdens will have implications on supplies of goods and services between Ireland and the UK.

e) Corporate Transactions and Contracts

- The UK will have to enact new competition law which will replace existing EU competition law. This may include new clearance procedure for mergers or takeovers involving UK companies.

- Existing contracts may need to be reviewed to ensure none of the obligations under the contract require either party to be based in the EU. Governing law, territory and jurisdiction clauses as well as references to EU legislation would have to be reviewed.

f) Trade

- As most analysts suggest that Brexit will have negative implications for the UK economy, it is expected that a reduced GDP in the UK will lead to reduced demand for Irish exports and hence reduced GDP in Ireland. Also the impact of customs controls and tariffs on imports, should they be re-introduced, would increase the cost of imports from the UK and of Irish products sold within the UK.

- Over €1 billion in goods and services is traded between Ireland and UK every week. The (November 2015) Economic and Social Research Institute's paper on the possible economic implications of Brexit for Ireland suggest that a Brexit is likely to significantly reduce bilateral trade flows between Ireland and the UK. It estimates that the impact could be 20% or more.

- Some sectors such as Chemicals and Pharmaceuticals account for a large share of exports to the UK; however sectors such as Agriculture, Food and Beverages and Basic Metals are relatively more dependent on exports to the UK and so the impacts on them would be more severe.

What next?

In general, companies should consider:

- What sectors of the company are established in the UK and how they may be affected by Brexit.

- Identify what personal data flows from the EU to the UK

Dillon Eustace continues to monitor the developments of Brexit and the implications it will have for your business. We will continue to follow these advancements and deliver any updates relevant to you and your company as the effects of Brexit begin to take shape.

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