BREXIT

A BRIEFING NOTE FOR CHARITIES, SOCIAL ENTERPRISES AND NOT-FOR-PROFIT ORGANISATIONS

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We hope that the content of this note will be a useful point of reference for charities, social enterprises and non-profit organisations in meeting the various challenges of Brexit, including beginning to navigate its impact on their operations, funding, people and interests, as well as their wider concerns.

This note is one of a series of specialist Allen & Overy papers on Brexit. To read these papers as they become available, please visit: www.allenovery.com/brexit.

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OVERVIEW

On 23 June 2016, the United Kingdom voted to leave the European Union, the first step in a process that is likely to lead to the biggest demerger in history: the world's fifth largest economy (the UK) leaving the world's largest economic grouping (the EU).

At this point, it is difficult to predict how or when the formal exit will actually occur and what legal and constitutional arrangements will be agreed between the UK and the EU. What is clear however is that Brexit, whatever its ultimate form, will have an impact on the legal rights and obligations of charities, social enterprises and not-for-profit organisations (NPOs), as well as on their ability to perform their operations and to sustain themselves both in the UK and internationally.

From an economic point of view, the uncertainty following the "leave" vote will have significant repercussions on NPOs in the short term, and possible long-term consequences as well. It is therefore important for NPOs to be fully geared up to face the challenges ahead.

Although some areas of the law will remain unchanged, NPOs will need to be mindful of the impact that Brexit may have in particular on employment law, data protection and other areas that are of importance to the operation of not-for-profit entities.

In this bulletin we highlight some key issues that NPOs are likely to face, and the steps that parties may wish to consider taking in the short term.

EXECUTIVE SUMMARY

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EXECUTIVE SUMMARY

EU law continues to apply until the UK formally exits from the EU. The key unknown at this stage is which post-Brexit model will be negotiated. From a legal perspective, for the moment it will be "business as usual", however market volatility resulting from the vote may trigger consequences, for instance under the terms of existing contracts. For NPOs, uncertainty in relation to Government and EU funding, as well as the potential contraction of donations linked to a decline in the status of the City of London, will be a major challenge.

Organisations and their advisers undoubtedly will need assistance analysing the immediate fallout from the Brexit vote. The law as it currently stands may not always go hand in hand with what politics requires.

There are three key legal points to flag:

- **First,** there are significant uncertainties about the implementation of a Brexit vote. The vote is only advisory and the question posed to the electorate was binary – "in" or "out" – so there is no mandate from voters as to the form that the UK's relationship with the EU should take on Brexit itself. It is unclear at present what negotiating stance the Government will take. Will it seek a Norwegian style relationship with the EU, a Canadian style free trade arrangement, or a different arrangement altogether?
- **Second,** there is currently no clarity as to when the formal negotiation period for the UK's exit will start. Under the terms of the relevant EU Treaty (Article 50 TEU), the UK Government must give notice to the European Council of its intention to exit the EU, but withdrawal must be "in accordance with [the UK's] own constitutional requirements". However, neither the EU Treaties nor the UK legislation governing the referendum specify the timing for delivery of that notice. This is a political decision. The timing of service of the notice is important because if no agreement is reached within two years from such service (and no extension is agreed unanimously between the UK and the remaining Member States), the TEU provides that the UK would automatically cease to be part of the EU, without any new arrangement in place. In light of this, we may see the UK Government seeking

to initiate scoping discussions about the terms of any withdrawal arrangements prior to formal service of the notice. Some Conservative party members have been suggesting that such discussions should start as soon as possible. The European establishment may, however, be unwilling to engage in meaningful negotiations before service of the notice, not least to avoid setting a precedent by making the process seem too straightforward.

- **Third,** the UK remains bound by European law until it formally exits the EU. That said, the constitutional principle of parliamentary sovereignty theoretically permits a withdrawal of the UK from the EU in breach of the Treaties, for instance by a simple repeal of the European Communities Act 1972. A repeal before formal negotiations with the EU would however be a highly controversial move and one unlikely to be followed in practice. We may nonetheless see attempts to pass emergency legislation disapplying certain EU laws or curtailing the authority of the Court of Justice of the EU (CJEU) prior to a formal exit.

1. BREXIT LEGISLATION - VARIOUS OPTIONS, BUT NONE ARE STRAIGHTFORWARD

The possibility of passing emergency legislation prior to the UK's formal exit from the EU has already been suggested by some in the Brexit camp. The passage of such legislation would face practical difficulties, however, not least because it would need to be passed by a Parliament which is currently pro-EU. It would also put the UK in breach of its international treaty obligations (assuming there is no agreement with the other Member States and no public policy or similar derogation from those obligations which the UK could rely upon) and would create additional uncertainty, which is likely to be very problematic for NPOs.

Assuming an orderly transition from EU membership to life as a non-Member State, how would that be documented as a matter of UK law? Much has been said about the mountain of EU law entrenched in the UK legal system. How will Parliament go about unpicking this?

The first point to note is that, until there is agreement on the post-Brexit model, it will be unclear what legislation needs to be unpicked. If the Norwegian model were followed, limited unpicking would be required; it would be a partial separation rather than a full scale divorce. Much of EU law would therefore still be applicable, although some gaps would need to be filled (e.g. in relation to agriculture). A full scale divorce however would be a much larger project resulting for example in a relationship based solely on trading under World Trade Organisation rules.

Once there is clarity as to what needs to change, there are various ways to effect that change. One possibility could be a single Brexit Act, which would repeal the European Communities Act and provide (as a transitional arrangement) that European laws will remain part of English law save where specified e.g. in a schedule to the Act and save that they will be overridden by subsequent English Acts of Parliament. However, the apparent simplicity of this solution is deceptive. Some EU regulations currently in force in the UK cannot be transposed wholesale in English law. Similarly, legislation which contemplates regulatory oversight/enforcement at a European level would need to be adapted and laws referring to other EU concepts would need amendment.

The approach of the English courts to interpretation of legislation may also change, as may the status of English case law applying EU law. The approach taken will also need to be different for different types of legislation, as follows.

- **European Directives:** these will have been implemented in the UK by UK legislation. That legislation will not fall away automatically on Brexit (although it may need amendment if, for example, it refers to European institutions or if the UK wants to take a different approach post-Brexit). Much of the UK's employment law is in this category.
- **European Regulations:** these become part of English law automatically when they enter into force at a European level, so there is no UK implementing legislation in place. These laws would therefore fall away on Brexit unless the UK decides to introduce national legislation in the same/similar terms.
- **"Softer" EU law (decisions of the CJEU, decisions of the English courts construing UK law consistently with EU law, guidance from EU institutions):** the English courts will likely no longer be bound by decisions of the Court of Justice on Brexit which means that the precedent value of existing decisions will fade over time.

It is also possible that new EU legislation that requires implementation in the UK in the run up to Brexit may be put on hold, which may create uncertainty. An example of this is the EU Directive on disclosure of non-financial and diversity information, which is due to be implemented by the end of 2016 and may influence UK companies' Corporate Social Responsibility programmes. It is also worth highlighting that Brexit will not lead to a bonfire of regulation. All developed nations are highly regulated (whether EU Member States or not) and there is no reason to think that Brexit would lead to a wholesale relaxation of the UK regulatory regime (although that is not to say there will be no change at all).

Parties are likely to want the UK Government to prioritise negotiating a trading relationship, both with the EU and potentially also with non-Member States, which are currently party to a free trade agreement with the EU that may fall away on Brexit.

Going forward, whichever model is adopted, the volume of legislative change likely to be undertaken will pose challenges: an important watch point for NPOs will be ensuring that bills are properly scrutinised for their impact on beneficiaries and client groups.

2. EMPLOYMENT AND WORKERS' RIGHTS

Although the longer term impact on UK employment law and worker mobility will depend on the form of the UK's post-Brexit relationship with the EU, employers can be reassured that there are unlikely to be any short-term changes as EU laws and free movement rights will continue to apply until the point of exit. However, there are some practical steps that you should consider now so as to be prepared to manage the impact of Brexit on your workforce.

Reassure employees

Your employees are likely to be nervous about where the vote leaves them, particularly if they are currently working under an overseas assignment arrangement. Will they be required to return to their home country? If so, how long will they have to sort out their affairs in the host country, and will there be a job for them to return to in their home country?

Employees may also be wondering what the company's plans are in terms of continuing to do business in the UK or Europe – will companies and NPOs be scaling back operations and, if so, what impact will there be on jobs?

In the short term, you should do what you can to alleviate employees' concerns, whether that is through engaging individually with those on overseas assignments, or through a collective announcement to the whole workforce. FAQ documents may also be helpful, even if the answers are inconclusive at this stage. Consider carefully what you are able to say in light of what is actually known and what comfort, if any, can be given on operations, relocations and jobs. You may wish to communicate with your employee forum, if you have one. Note, however, that this communication exercise is separate from your legal duties to inform and consult employee representatives (whether in the UK or in affected jurisdictions) if any proposals have crystallised and triggered those duties under UK or local laws or under any European Works Council arrangement.

Audit your workforce

Identifying those UK nationals working for you elsewhere in the EU, and nationals from other EU countries working in the UK, will be essential to help you plan for the labour mobility restrictions and labour shortages that could result from Brexit. Extend your audit to workers in (and from) Norway, Iceland and Liechtenstein (as EEA Member States) and Switzerland, who could also be affected by the post-Brexit model.

Review European expatriate arrangements

As part of your audit, review expatriate and secondment arrangements between the UK and these countries to check when they end or how they can be terminated and whether employees have been promised repatriation. Consider your risk exposure if arrangements have to be terminated early and there is no job for individuals to return to in their home country, and also how that risk could be managed (e.g. through redeployment opportunities). Pending arrangements should be reconsidered and possibly even delayed if there is doubt as to whether the arrangement can be honoured.

Track your European expatriate workers' immigration status

UK nationals working in a different Member State, and other EU nationals working in the UK, could theoretically lose their automatic right to travel and work freely across the EU following Brexit, though in reality, transitional arrangements and concessions are likely to be negotiated as part of a post-Brexit regime.

Restrictions could also extend to workers in (and from) other EEA countries and Switzerland, depending on the post-Brexit model. The shape of future immigration policy is uncertain at this stage as well as being a politically fuelled issue. The UK Leave camp has confirmed that it wants the Government to introduce a bill to end the automatic right of all EU nationals to enter the UK by the next General Election (scheduled in 2020). It also wants to create a new points-based immigration system for EU nationals post-Brexit (as currently applies for non-EU nationals) permitting them to enter the UK to work only if they possess suitable skills. It may take a while for the UK Government to regroup and clarify its intentions.

However, we can expect other EU Member States to impose immigration controls on UK nationals seeking to work in their jurisdictions that correspond to (or even exceed) those that are imposed on EU nationals seeking to enter the UK.

In light of the worker mobility restrictions that could result, your workforce audit should include checks on the current immigration status of your EEA (and Swiss) expatriate workers, the duration of their stay abroad or in the UK and the date on which they can apply for permanent residence or citizenship (including potentially dual citizenship) under local rules.

Take steps to secure workers' UK immigration status

Although it will be some time before we know the immigration position, and any new legislation will require Parliamentary approval, we do not expect any new legislation to affect those workers who are already lawfully in the UK. You may therefore wish to consider whether it is worth bringing workers into the UK now, or taking steps to secure their UK immigration status or citizenship rights pending immigration changes once the two-year period for the UK to negotiate its exit has passed.

Those who are eligible for permanent residence (i.e. who have been in the UK for five years exercising their right to freedom of movement or who qualify on another basis such as marriage to a UK national) should be encouraged to apply for a permanent residence card to establish their right to remain in the UK indefinitely. Applying for UK citizenship may also be an option for some employees, subject to dual nationality restrictions (and a strict day count requirement).

Anticipate skills and service gaps

Depending on the post-Brexit model, it may (as explained) become more difficult to recruit and retain employees or to move them from the UK into the EEA and vice versa. Employees may be unwilling to agree to their jobs being relocated or, if they have to return to their home country, there may not be local talent (with an unrestricted right to work) to replace them.

Any one of these scenarios could give rise to skills gaps, an inability to service customers in relevant jurisdictions and a loss of talent.

This may extend beyond the EU if recognition of qualifications, or the ability to operate in particular jurisdictions, derives from free trade agreements entered into by the EU rather than the UK. The likely impact on business continuity will no doubt be at the forefront of management discussions but, from an employment and HR perspective, you need to consider how your organisation could fill these gaps, and also anticipate the need for possible redundancies.

Identify any minor contract or policy redrafting required

The Brexit vote itself does not trigger any UK employment law changes, nor do we expect there to be any changes in the short term. The more probable outcome is a series of piecemeal changes over time, and any trade deal agreed with the EU will likely entail the UK maintaining employment law standards similar to those at present. A wholesale review or amendment of employment contracts and policies is therefore unnecessary at this stage, but it is worth checking whether specific provisions could be affected by Brexit, for example, restrictive covenants, confidentiality or IP obligations with geographical restraints linked to the EU or EEA.

You will not need to amend these provisions until the UK leaves the EU, but you might choose to amend them in advance, and to update new contracts, to address any unenforceability risks that would follow Brexit. Note that EU-derived rights may have become incorporated into employment contracts or policies. You would be required to follow a fair process prior to removing or varying these rights to manage the risk of employee claims. If negotiating the employment provisions in long-term outsourcing or PFI agreements, ensure that exit provisions are drafted so as to cover the possibility that TUPE may be amended or (less likely) repealed in the future.

3. EU FUNDING AND FINANCE

NPOs with activities or a presence in the UK have benefited from EU membership as to their funding and resources. As a consequence of Brexit, certain NPOs may face considerable funding hardship both in the short and medium term.

In the short term, that is to say before the UK formally leaves the EU, charity funding will suffer the consequences of the economic uncertainty surrounding the Leave vote.

Not only will private and government funding likely be downsized but it is unclear whether and what EU funding will be available for charitable activities in the UK in the interim period before formal withdrawal, particularly given it is uncertain whether the UK will be paying its own EU contributions during the period after the referendum and before formal Brexit. In the medium to longer term, if the UK leaves the EU, NPOs that benefit from EU grants will find it harder to obtain new funding from non-EU sources.

The EU budget amounts to approximately EUR 150 billion each year. The European Commission has overall responsibility for implementing it but decisions about final beneficiaries and actual transfers of money to them can be taken by other bodies. 80% of the budget is managed by Member States' national governments through a system of "shared management", largely through five large Structural & Investment funds. These mainly consist of:

a. regional and urban development funds;

b. social inclusion and good governance funds;

c. funds destined to poor regions in Europe;

d. agricultural subsidies; and

e. maritime and fisheries funds.

Some of the EU structural funds have significantly supported disadvantaged communities and invigorated the labour market in Scotland, Wales and Northern Ireland. Other funds managed directly by the EU include grants for specific projects or tenders for goods and services issued by EU institutions. All these funds are mainly destined for EU Member States. Under indirect management, the Commission delegates managing the EU budget to partners including non-EU countries for specific non-EU projects (a very minor proportion of the EU-funded projects).

Of most relevance to the third sector is the EU's funding in the sectors of justice, home affairs, border protection, immigration and asylum, health, consumer protection, culture, young people, information and communications, but also the funds destined for international affairs, armed conflict, aid and development cooperation (responses to humanitarian crises, e.g. in Syria, Ukraine, South Sudan, the Central African Republic, Mali, and the fight against Ebola).

The EU is at present the world's largest humanitarian aid donor. The "Britain Stronger in Europe" campaign published research suggesting that in 2014, 249 charities and third sector organisations received £217 million from the EU.

The National Council for Voluntary Organisations (NCVO) estimates that in 2013/14, charities received around £308 million direct funding from the EU. The Royal Society states that, between 2007 and 2013, the UK received EUR 8.8 billion (£6.8 billion) in direct EU funding for research, development and innovation opportunities. Information on existing EU sources of funding can be found on the EU's website[1] and also on the UK Government's website.[2]

When the UK formally withdraws from the EU, equivalent funds would unlikely be made available to NPOs by future UK Governments. The UK Government will indeed have to decide whether and how to replace this funding and how to allocate their new budget.

It may be advisable for NPOs to consider restructuring or having a presence in an EU Member State post-Brexit so as to benefit from EU funding.

4. CONTRACTUAL TERMS

To date, substantive English contract law has largely been unaffected by the proliferation of EU law, at least in the context of general commercial contracts (although the position is more complex in other spheres, for example in relation to consumer contracts and agency contracts). Instead, the law on almost all key contractual issues (including how a contract is formed, consideration, terms which can be implied into a contract, exclusion clauses, interpretation of contracts, the bases on which contracts can be avoided, breach, frustration and damages) derives principally from English common law. It is therefore our view that, in relation to such contracts, Brexit is unlikely to have a substantive impact on most contractual terms.

Two particular types of contractual terms that are worth focusing on are English governing law and jurisdiction clauses. These are frequently included as express terms in contracts and indicate, respectively, that the parties have agreed that their contractual relationship should be governed by English law and that any dispute which arises in connection with the contract will be heard by the English courts as opposed to the courts of any other country.

Should parties change their approach to choosing English law and the English courts following Brexit?

Our view is, in general, no – most of the reasons why parties choose English law to govern their relationships or to litigate their disputes in the English courts are entirely unconnected with the UK's membership of the EU and would be unaffected by any departure. It is highly unlikely that Brexit would have any substantive impact on English governing law clauses being upheld and applied by

1. http://europa.eu/about-eu/funding-grants/
2. https://www.gov.uk/government/policies/european-funds

English courts or elsewhere. In relation to English jurisdiction clauses, save in a limited category of cases where there may be more perceived difficulties in enforcing judgments, we do not think Brexit should stop parties from choosing the English courts to hear their contractual disputes.

Some contracts (e.g. IP or IT licences and distribution or franchise agreements) may contain territorial restrictions that refer to the EU. These would likely need to be amended following Brexit, as would references to EU legislation to the extent it is no longer applicable.

Finally, in relation to financing and loan contracts, these often contain provisions which state that an event of default (i.e. an event which allows the lender to demand full repayment of an outstanding balance earlier than the date it was originally due to be paid) will occur where there has been a Material Adverse Change (MAC).

It is very unlikely (although not impossible) that the vote (rather than Brexit itself) will trigger a MAC event of default in loan agreements.

Any such triggers would be unusual and fact-specific and a lender would need to be extremely sure of its ground before it relied on a MAC clause to accelerate the payment of a loan. Once agreement is reached on the ongoing relationship which the UK will have with the remainder of the EU, this could trigger MACs for some UK-based NPOs if they no longer have unrestricted access to the EU market or the ability to move people around. Again, however, this will be highly fact-specific, and the same general risks about calling a MAC would apply.

5. INSURANCE

We expect regularly renewed insurance policies to be renewed on terms that cater for Brexit. Historic policies that still provide cover (e.g. occurrence-based policies) will need to be reviewed for provisions referring to the EU which, following Brexit, would exclude the UK.

6. DATA PROTECTION

Protecting the privacy of individuals has become increasingly important as awareness of the risks, and the volume of personal data processed, both continue to increase. We are at an interesting time for data protection legislation in the EU.

The existing EU Data Protection Directive, implemented in national law by each Member State, will almost certainly be replaced in 2018 by a new, recently agreed General Data Protection Regulation (the **GDPR**), which will be directly applicable in the UK. This contains some fairly onerous new obligations on those who process personal data, and potentially huge fines for failure to get it right.

Data protection has, as a result, been catapulted into the board room and companies are already planning for compliance with the requirements.

At the same time, the current mechanisms for transferring data outside the EU (which are based on a similar toolkit under the GDPR) are under scrutiny. The Safe Harbor regime, which permitted certain transfers to the U.S., was recently declared invalid and national regulators are examining its proposed replacement, the "Privacy Shield". They are also re-considering whether other compliance actions are subject to the same flaws as Safe Harbor.

Although data protection is cited at times as an example of "red tape", the UK's withdrawal from the EU will not necessarily change the level of data protection expected of companies or NPOs processing data in the UK to any significant degree.

As a matter of policy, UK law is likely to impose a broadly equivalent level of data protection to that agreed in the GDPR, at least for personal data transferred to or from the EU, if only to avoid (in the long term) the UK putting in place a similar mechanism to the Privacy Shield, or the need for UK companies to adopt other compliance actions, to enable data to be transferred to them.

From a practical point of view, many NPOs and companies operating in more than one region of the world also find it more convenient to put in place policies and procedures that are consistent across the countries in which they operate. If the UK were to adopt looser standards, this would be unlikely to affect their approach to compliance in the UK. Brexit will most likely, however, result in UK NPOs and companies that operate in Europe no longer being able to have the UK data protection regulator (the ICO) as their lead supervisory authority in the EU.

7. INTELLECTUAL PROPERTY

From an IP perspective, the impact of a Brexit will be significant. NPOs are most likely to be affected as regards their brand and to a minor extent in relation to certain copyright protected works. For NPOs operating in innovative industries such as technology and life sciences, it will be of interest that uncertainty currently hangs over the Unified Patent Court (UPC) system and the Unitary Patent, an EU harmonisation project that was planned to enter into force in 2017.

For community-wide rights such as EU trade marks or designs, these will, once Brexit happens, no longer have force in the UK but we expect that owners will get the right (perhaps an automated one) to parallel UK national rights with the same priority dates. Unitary rights granted by the EUIPO such as registered EU trade marks and registered community design rights will no longer be enforceable in the United Kingdom if the United Kingdom ceases to be an EU Member State. The EU Trade

Marks Regulations and the Community Design Regulations will no longer be directly applicable in the UK and any continued protection of existing EU rights in the UK will require an express Act of Parliament or else right-holders will be faced with a gap in protection. Unless another appropriate arrangement can be found to maintain UK protection under an EU right, the UK could choose to allow automatic conversion of all EU designs and trade marks into UK registered rights or otherwise put in place a procedure for right-holders to apply for equivalent UK protection, possibly backdated to the original EU priority date to avoid novelty issues.

The jurisprudence of the EU courts will remain persuasive in those areas but will no longer be binding on UK courts. Pending greater clarity on the situation post-Brexit, it may be advisable to register a UK trade mark or design in parallel to any EU rights currently held.

The English law of passing off is unlikely to undergo much change.

Copyright law is less harmonised across the EU than other IP rights. Each EU Member State determines independently when and how copyright subsists in qualifying creative works. The UK has its own copyright regime largely independent from the influence of European law: copyright in a creative work subsists automatically provided that the English legal criteria are met. This will remain the case after the UK withdraws from the European Union.

Nonetheless, there are two areas of copyright that will be affected: those that, in spite of not being expressly harmonised, have been converging in Europe through the jurisprudence of the EU courts (e.g. the meaning of "originality" in copyright law), and those that have been fully harmonised through EU Directives and Regulations. As to the former, following a formal withdrawal from the EU, the English law in those areas will no longer be subject to the jurisprudence of the EU courts and consequently English judges might choose to depart from recent trends and adopt a radically difference stance.

The greatest uncertainty will be in the latter, that is, in areas that have been harmonised across the EU. In those areas, UK copyright law may undergo significant change post-Brexit if the UK government chooses to legislate in a manner that departs from current EU trends.

In the short term, a high level of divergence is unlikely, particularly if the UK decides to remain part of the EU single market. Harmonised areas include copyright protection of computer software, cable and satellite transmissions, certain provisions on the duration of copyright, the sui generis database right. The Information Society Directive harmonises the reproduction, communication, and distribution rights of copyright owners by electronic means along with the implementation of technological protection measures to avoid widespread infringement. Most importantly to NPOs, the Directive also attempts to harmonise some of the copyright exceptions and defences, i.e. areas where using or copying someone else's work should not be illegal.

On formal withdrawal from the EU, the UK will have to decide whether and how to provide for protection of IP rights used in trade across EU and non-EU countries. It will be a matter of legislative choice whether to provide for EEA or international exhaustion of rights. Also at risk are harmonisation measures achieved in areas such as biotechnology (Biotechnology Directive), IP enforcement (IP Enforcement Directive) and pharmaceutical regulation law, though much will depend on the Brexit model adopted.

Overall, the main principles governing the enforcement and protection of intellectual property rights will remain in place in the UK post-Brexit, however the legal landscape will change in many ways that are yet to be fully clarified and will depend on the outcome of the UK's negotiations with the EU.

8. COMPETITION

EU competition law applies to all undertakings operating in the EU single market. An undertaking is a body engaged in economic activities. A body can act as an undertaking in respect of some of its functions (commercial supply of goods or services) and not others (services wholly social in nature). Companies and NPOs acting as undertakings, wherever they are based, are liable for large fines if they infringe the EU competition rules in Articles 101 and 102 of the Treaty on the Functioning of the European Union respectively prohibiting anti-competitive agreements or abuse of dominance. Parties to major transactions have to notify Brussels if the thresholds of the EU Merger Regulation (EUMR) are met. Thus, post-Brexit, any UK businesses or NPOs wishing to offer their goods and services in the EU Member States will continue to find themselves automatically bound by EU competition law.

In addition, the UK has adopted its own national legislation in the Competition Act and Enterprise Act which is closely modelled on EU competition law. Brexit is unlikely to alter the fundamentals of competition regulation in the UK. However, if the UK formally withdraws from the EU, the EU treaties will no longer be directly applicable in the UK.

With regard to private damage actions for breaches of competition law, there is likely to be little change. In fact, in this area the UK is a leading light in the EU. A new Damages Directive is being implemented across the EU which is designed to make it easier to bring private damages actions and to harmonise the approach of national judicial systems to such actions. Many of the measures incorporated in the Directive are already an established feature of UK law and procedure (which is why the UK is so often chosen as a forum for bringing these actions). The UK goes further than the EU approach in some areas. For example, with the Consumer Rights Act 2015, which took effect in October 2015, the UK provides for opt-out class actions for competition damages claims: a step

further from the purely opt-in regime in place at EU level. However, if the UK leaves the EU, the legal force of EU law in the UK courts is unclear, and UK courts could choose to depart significantly from the EU jurisprudence on competition law.

One area of competition law and enforcement where Brexit will make a considerable difference is state aid. If the UK exits without any special trade agreement with the EU, then the UK will be outside the state aid control system that entails the prohibition and repayment of any aid granted by EU Member States which is likely to distort market competition.

Technically this would mean that the UK Government would have greater liberty to give aid to UK businesses and NPOs performing an economic activity. It would also have more freedom to grant preferential tax treatment to certain entities. However the reverse of this is that post-Brexit the UK will find it more difficult to complain successfully to the Commission about EU Member States distorting competition through similar state aid, although of course the Commission will continue to police state aid rules internally. In contrast, if the UK wishes to negotiate an exit on terms that allow it to continue trading as part of the single market (or an exit on similar terms), then the EU may well insist that the UK adopts equivalent state aid rules under national law to preserve a level playing field with EU-based competitors. In this scenario, there may be little practical change.

Because of the strong competition law enforcement regime in place in the UK as a matter of national law, Brexit may have less direct impact in the competition field than in other areas of the law (particularly, for example, in the important new area of private competition litigation). However, as in other areas, much may depend on the terms of any final agreement reached by the UK Government with the EU. If the UK were to re-join the EEA and have a status similar to Norway, UK businesses and NPOs would be subject to EU competition law.

As a result of Brexit, divergent enforcement policies and priorities could emerge as the UK fashions its own competition policy outside the EU structure and processes. Other UK national regulators with concurrent competition powers, such as the Financial Conduct Authority, OFCOM or OFGEM, may have different enforcement positions that will increase divergence from EU law. The risk of divergence will affect undertakings, including NPOs that operate across the UK and EU markets.

9. TRADE (IMPORTING AND EXPORTING)

The free movement of goods and services are two of the fundamental "four freedoms" underpinning the European single market.

Post-Brexit, Britain's unhindered access to the world's largest trading bloc will be in severe peril.

The single market has been realised both through the abolition of tariffs and trading rules that hinder the free movement of goods and services throughout the Member States, as well as by harmonising (through EU law) those rules affecting products and services (for example, specifying quality and safety standards).

The effect of the imposition of tariffs and other barriers to trade will be unknown until the terms of the UK's withdrawal from the EU are settled. Even if tariff barriers are low or non-existent, there is a likelihood that certain regulatory regimes of the EU and the UK will diverge over time. NPOs involved in the production or export of goods sold in the UK and the EU will then need to ensure compliance with two regulatory regimes, which, for example, could require different production standards for each market.

NPOs providing services throughout the EU are also likely to be affected in a number of ways. Services that are located in other EU Member States and which are not freely available in UK are likely to become more difficult to access. Similarly, it will be more difficult for EU citizens to access services provided by UK NPOs. Once a service is legal in one member state, in general it is accessible to consumers across the EU, even if the provision of such a service is not permitted in another member state.

Following Brexit, it is conceivable that services provided by UK NPOs will be more difficult to access by citizens of EU Member States where the provision of such services is illegal.

Although the issue of funding is dealt with separately, it is also worth bearing in mind that NPOs could find it more difficult or more expensive to access and transfer funds in and from EU banks to the UK, and vice versa, particularly as the fate of the single market in financial services is likely to be one of the more controversial subjects in the Brexit negotiations.

In conclusion, at this early stage it is impossible to say how the single market in goods and services will be affected until the terms of the UK's exit from the EU are agreed. In a best-case- scenario, the UK will retain full access to the EU single market, with little deviation from the status quo. It may be, however, that agreements will be concluded between the UK and the EU on a sector by sector basis (similar to the EU-Swiss relationship), which will lead to market fragmentation as certain goods and services have full market access but others do not. If no trade deal is concluded by the time of withdrawal, the UK needs to rely on its membership of the World Trade Organisation as the basis for its trade with the EU. A lack of a trade deal would almost certainly mean that tariff and non-tariff barriers would be introduced on imports and exports between the UK and the EU, with consequential increases in costs for NPOs whose activities are affected.

10. PUBLIC PROCUREMENT

EU rules on public procurement seek to ensure that public authorities purchase goods, services and works from suppliers fairly, transparently and without discrimination on nationality grounds. These rules are contained in a series of Directives that have been transposed into UK national law. This means that once the UK ceases to be a part of the EU, the current UK law on public procurement should continue to apply unless or until it is replaced by a new national regime or other relevant laws.

The current rules apply if a public authority purchases goods, services or works above certain financial thresholds (which may differ depending on the type of public authority and the type of contract being purchased). The rules are intended to cover bodies governed by public law and it is important to note that a wide range of public authorities are covered. The application of the procurement rules is therefore not limited to government departments or local authorities, but also includes various non-departmental government bodies and charities, e.g. the British Library.

Contracts which fall within the procurement rules must comply with certain requirements, including provisions relating to advertising and procedures to be followed. For example, relevant contracts must usually be advertised by publishing a contract notice in the Supplement to the Official Journal of the European Union, unless an exception applies.

In practice, the nature, content and application of procurement rules following the UK's exit from the European Union is likely to form part of the negotiations around internal market access.

At this point, therefore, it is impossible to predict exactly how these will change as a result of Brexit. It is likely, however that if the UK wishes to maintain full access to procurement in the EU internal market for UK businesses, it will be obliged to agree to some form of reciprocal access for EU businesses to UK processes going forward.

As the precise future of procurement regulation in the UK remains uncertain, NPOs and companies with an interest in public procurement should monitor the public debate surrounding Brexit to assess whether there are any calls to allow UK public entities to discriminate in favour of UK suppliers. If this becomes an issue, the UK may advocate relaxations to the current EU procurement regime as it currently applies to the UK.

11. TAX

When the UK leaves the EU, it will probably cease to be a part of the customs union. Exports between the UK and the EU would then need to go through customs procedures. However, we would hope that the UK and the EU enter into a free trade agreement with no or very low customs duties.

One area that may be subject to change and that is relevant to NPOs is tax relief on donations across EU tax borders.

As a result of the Persche case, where a taxpayer claims, in a Member State, the deduction for tax purposes of gifts to bodies established and recognised as charitable in another Member State, such gifts come within the remit of the free movement of capital, even if they are made in kind in the form of everyday consumer goods. In the UK, under the Finance Act 2010, recognition for tax purposes requires the charity to be based in the UK, EU, Iceland, Liechtenstein or Norway, established for charitable purposes (as defined in the Charities Act 2011), registered with the Charity Commission or other applicable regulator, run by "fit and proper" persons and recognised by HMRC.

HMRC has, in the past, demonstrated reluctance to recognise overseas charities and, following Brexit, it is unclear what the position may be in respect of donations made in the UK to a charity established in an EU Member State or indeed for donations made in an EU Member State to a UK charity.

Unless the EU or individual Member States agree to retain this reciprocity this relief may no longer be available.

In addition, following Brexit the UK will sit outside the territorial scope of EU VAT. It could therefore change how VAT is charged in the UK or even replace it with an entirely different tax. Over time, there could be some divergence from EU VAT, although the risk of double taxation or double non-taxation may incentivise the UK to keep its VAT system materially aligned with the EU's. In general, charities rely on lower rates and reliefs from VAT. It is arguable that, post-Brexit, the UK government may grant more favourable reliefs to charities in respect of VAT although this is largely dependent on government policy. The most tangible consequence of Brexit will likely be the imposition of 'import' VAT when goods enter the EU from the UK and vice versa. The VAT will often be recoverable, but there may be an unwelcome cash flow cost for the period between import and recovery.

EU Directives prohibit withholding taxes on intra group interest, dividends and royalty payments made within the EU.

Following Brexit, EU subsidiaries of UK parent companies will not be able to rely on the directives to make these payments to their UK holding companies free from withholding taxes.

Relief under bilateral double tax treaties will be an alternative, and in many cases will eliminate withholding taxes entirely. At some point after Brexit we may see the UK reintroduce UK tax rules that have been held contrary to EU law. The 1.5% stamp duty charge on UK shares issued into clearing systems such as Euroclear, Clearstream and DTC is one example. The UK will also have more scope to adopt competitive tax regimes that would currently be contrary to state aid rules.

Conversely, we may see anti-avoidance rules applying to arrangements with UK businesses that would previously have been exempt.

For the UK, Brexit will mean the retention of sovereignty over fiscal matters. For the rest of the EU, Brexit could accelerate the harmonisation of corporate income taxes. This will not necessarily be the case; other Member States are against further harmonisation. However, the loss of a large and influential opponent could be decisive.

12. ENVIRONMENT AND CLIMATE CHANGE

Businesses and NPOs across Europe are subject to a wide range of environmental, climate change and product-related laws. These take the form of EU Directives (requiring implementation by each Member State), Regulations (which are directly applicable) and national-level rules. A significant amount of soft law also exists in the form of EU and/or national-level guidance. The precise form of the legislation very much depends on the policy area.

The key point, however, is that over the last two decades, by far the majority of UK environmental and climate change policy law has been driven by the EU.

How the UK will disentangle itself from this picture raises both questions of substance (how far does the UK Government and Parliament wish to continue to follow EU policy initiatives in this area?) and form (what steps would need to be taken now even to maintain the status quo?). Similarly, the form of the UK's post-Brexit arrangements with Europe, including the type of trade deal(s) the UK is able to strike with the EU after a Brexit will affect the approach to adopting EU legislation on the environment and climate change. Those who thought that a Brexit would lead to significant de-regulation in these areas may be sorely disappointed; although there clearly will be voices calling for a lighter touch regulatory regime in the UK.

In this early post-Referendum period, it is not yet clear what the Government's position on the environment and climate change agenda will be. However, now is a good time to consider the impact of any potential changes so that strategic planning can begin.

A significant number of the UK's environmental laws (producer responsibility, waste and environmental liability are just some examples) are derived from Directives and based upon European environmental policy more generally. How much will be left in place? In a number of areas, it is difficult to see any UK Government taking a radically different policy approach than that set out by the European Commission. However changes will be implemented over time to adapt existing laws to any divergent UK policy which may emerge in the future.

The position as regards EU-level Regulations is more nuanced. In this case, we have directly applicable laws. Given the importance of the EU as an export market for UK-based businesses it's clear that exporters will still need to comply with many of the European rules in order to gain access to the EU market.

In this regard, even if Brexit leads to some de-regulation on environmental, product and climate-related policies, there may be sound commercial reasons for businesses to comply with certain EU standards and requirements.

In terms of climate change, there are no signs as yet that the current Government will take a different path from the EU on climate change policies. The UK has for many years seen itself as a leader in climate change initiatives and has introduced much of its own domestic legislation in addition to EU laws. For example, the UK has enshrined its own greenhouse gas reduction targets in the Climate Change Act and has shown its commitment to these targets through its recently issued Fifth Carbon Budget, which aims to reduce carbon emissions by 57% against 1990 levels by 2032. It is understood that the Government has committed to publishing before the end of the year the plans to meet this target. The UK is also a separate signatory to key international climate change Conventions (including the most recent Paris Agreement).

The UK was one of the first EU countries to develop its own Emissions Trading Scheme, which heavily influenced the EU model. It has introduced a raft of climate change and energy efficiency-related legislation over the past decade, including introducing a Carbon Floor Price to incentivise a low carbon energy market. The Government has committed to setting the long-term direction of the Carbon Price Floor in the 2016 Autumn Statement.

However, there are questions on how the UK can continue to meet future climate change obligations: whether it will (or will be able to) do so alongside the EU bloc and possibly retain (or not) its share of the EU's reduction burden. Indeed, its future role within the EU Emissions Trading Scheme is far from clear.

Would international conventions provide an adequate basis for regulation of environmental and climate change issues in the UK? On their own, probably not. This is partly because there are significant areas of law which are largely untouched by international conventions (e.g. waste management). and because certain key conventions (e.g. those on chemicals) are implemented in the UK via EU Regulations. These directly applicable Regulations will fall away (in the absence of any transitional provisions) once the UK leaves the EU. So, even allowing for the UK's historically proactive stance on signing up to many of the key conventions, there are areas where fresh legislation would be required post-Brexit and any subsequent repeal of EU-derived laws.

Another potential issue is whether the UK will wish to negotiate as an independent party to the conventions. The future relationship with the EU may be such that the UK is, in any event, required

to follow the EU position in these negotiations (for instance, under the EEA model).

If the UK seeks to participate as an independent member of the EEA/EFTA (for which approval would be required from the other members of these groups), there may in practice be little change to the legal landscape. As a member of the EEA, most of the EU rules on environment, climate change and product regulation which currently apply to the UK would continue to apply. However, as a non-EU member of the EEA, the UK would not be permitted to participate directly in any of the EU law and policy making.

There is clearly a much greater risk of divergence in the event that the UK does not follow the EEA route. This will also bring with it greater political risk as successive UK Government (and the devolved administrations of Scotland and Wales) seek to put their stamp on environmental and climate policy.

A significant body of environmental law emanates from decisions of the CJEU, e.g. waste law. How would UK regulators respond to decisions of the CJEU and would the UK Courts be bound (in law or practice) to follow CJEU decisions? Again, the answer may depend on the form of the future relationship between the UK and the EU (for example, an EEA/EFTA arrangement requires CJEU judgments to be followed).

In addition, it is difficult to perceive how the UK could follow many of the EU's environmental policy and legal developments without also following and applying the judgments of the European courts.

13. EU DIRECTIVE ON DISCLOSURE OF NON-FINANCIAL AND DIVERSITY INFORMATION

The EU's sustainability initiatives impact on many UK companies' long-term corporate social responsibility programmes. In particular, in December 2014, the EU Directive on disclosure of non-financial and diversity information by certain large companies, amending the 2013 Accounting Directive, entered into force within the EU. The Directive introduced measures aimed at strengthening the transparency and accountability of approximately 6000 'public interest entities' in the EU. Entities within scope of the Directive will be, amongst other things, required to report on environmental, social and employee-related, human rights, anti-corruption and bribery matters.

Member States were given two years to transpose the Directive into national laws, which is part of the wider EU's initiative on Corporate Social Responsibility. It is expected that the first company reports will be published in 2018 covering financial year 2017-2018. The UK government consulted on implementation of this Directive earlier in 2016. It is currently analysing responses and it remains to be seen whether Brexit will lead to a change in approach.

14. HUMAN RIGHTS

Human rights are protected in the UK in a number of ways, including: through the development of common law; by statute (including the Human Rights Act 1998 and other legislation such as the Equality Act 2010 and Care Act 2014); at international treaty level (including by the UK signing up to the European Convention on Human Rights (the ECHR) and numerous other international conventions); and by virtue of the application of EU law (including the Charter of Fundamental Rights and Freedoms (the Charter)).

The extent to which these protections will be affected by Brexit (if at all) has been the subject of some confusion, particularly regarding the roles of the ECHR and the Charter. However, Brexit will only directly affect the application of EU law within the UK, and then only once the UK has formally left the EU. In the other sections of this bulletin we have considered the effect of Brexit on specific rights such as workers rights and data protection; this section looks at human rights protections more generally.

At the outset it is important to understand why the ECHR is not affected by Brexit. The ECHR is an international treaty which the UK signed as a member of the Council of Europe. The Council is an international organisation founded in 1949 to promote democracy and the rule of law in Europe. Although all 28 current EU Member States are members of the Council, it has a much larger membership currently comprising 47 European states. Moreover, the ECHR is not an EU instrument and is enforced by the European Court of Human Rights in Strasbourg.

The ECHR is also largely part of UK law by virtue of its incorporation into domestic law by the Human Rights Act 1998. As such, the protections afforded by the Convention are part of domestic UK law. Although significant questions have been raised regarding the future of the Human Rights Act (including its replacement by a "British Bill of Rights") and/or the UK's continuing membership of the Council of Europe, these are not strictly related to the question of EU membership, although it is conceivable that they could be addressed at the same time.

The Charter is distinct to, but often confused with, the ECHR. It forms part of the EU Treaties and would cease to apply to the UK upon its exit from the EU. The Charter applies to EU Member States when implementing EU law and it is enforced by the EU courts in Luxembourg.

Although the Charter protects many of the same rights as the ECHR, it also provides for some important additional protections such as in the fields of data protection, economic rights and children's rights. In cases where the Charter provides for stronger protection than the ECHR, these rights will generally be lost when the UK withdraws from the EU.

EU law currently provides a number of additional human rights protections outside the Charter's framework and the extent to which they will remain post-Brexit partly depends on the way in which

the particular laws were implemented in the UK. For example, where European Directives have been implemented via primary legislation in the UK (of which the Equality Act 2010 is an example), that legislation will remain part of English law on Brexit, unless it is amended or repealed. Conversely, European Regulations that have direct effect in the UK without the need for implementing legislation (e.g. the Data Protection Regulation) would fall away on Brexit unless legislation was passed transposing those laws into UK law.

Although Brexit will not directly affect the Human Rights Act, the ECHR or many of the other human rights protections afforded to UK citizens other than those deriving from EU law, it remains to be seen how the new Conservative Government will progress the party's 2015 election manifesto commitment to repeal the Human Rights Act and/or leave the Council of Europe as that is likely to have a much more substantive and far-reaching implication for human rights protection within the UK.

15. CONTRIBUTING TO GOVERNMENT OR INDUSTRY CONSULTATIONS

If you conclude that your best interests require the UK government or the EU to act in particular ways, you may wish to consider your options for lobbying – whether in London or Brussels, or elsewhere. Should you lobby alone, or as part of a larger group (such as an industry lobby group), you will need to comply with applicable rules in the UK, Europe and beyond.

CONCLUSION

NPOs will be impacted by Brexit in a number of ways. It is still early days and difficult to predict exactly what form changes will take.

As far as trade and cross-border commerce are concerned, the law is unlikely to change much. In areas affecting citizens of the EU and UK such as employment, immigration and human rights, more radical change is expected, but such change will be progressive.

It is important for NPOs to keep an eye on evolutions in the law that are relevant to their operations. As the economic situation and lesser availability of EU funding is making their life difficult, NPOs will have to face the renewed challenge of protecting citizens from abuses and promoting the public interest at a time when this is most needed and will be in high demand.

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