



Brexit Next: Legal Implications

June 2016

Your World First

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Introduction

The British people have voted to leave the European Union.

No European Union Member State has ever left the EU so the process of withdrawal is untested. Effecting a successful “Brexit” will involve disentangling the UK from complex politico-legal, financial and other relationships and obligations. Prior to the referendum the UK government stated: “a vote to leave the EU would be the start, not the end, of a process.”

Our withdrawal from the EU requires the UK to secure a long list of international agreements and arrangements in many different areas. It is important to note that the UK will continue its membership of the EU and will continue to be subject to EU law for a number of years to come as Brexit is negotiated and may continue to be subject to much of that law after Brexit, depending on the nature of the trading relationship negotiated.

As Europe’s largest law firm, we will be regularly updating you on the legal implications, providing insight and information as new developments unfold in key areas such as employment, tax, healthcare and energy as well as in financial services.

With over 850 lawyers in the UK and 3,000 globally, CMS is a top 10 global law firm and largest law firm in Europe with 39 offices in 18 EU member states.



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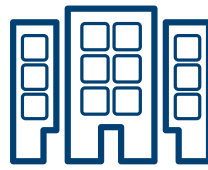
Icons



Banking and Finance



Insolvency



Real Estate



Funds



Public Procurement



Employment



Environment



Health & Safety



Insurance



Real Estate
& Construction



Competition



Pensions



IPF



Energy



Corporate



Disputes



All



Tax



Private Equity







Compliance



Banking

What are the legal issues in relation to Debt Finance following a Brexit?

Issue	Impact	Areas of law affected
Possible activation of increased costs provisions in finance documentation	Lenders may seek to recover costs incurred if compliance with UK and EU regulation imposes additional costs.	 Banking and Finance
Bail-in clause to comply with Article 55 of the EU Bank Resolution and Recovery Directive to be inserted into English law governed finance documents if the UK is not part of the European Economic Area	Finance parties may require immediate amendment of finance documents since a lack of bail-in clause will make debt participations less attractive to EEA lenders if there is no bail-in clause.	 Banking and Finance  Insolvency
Choice of law and choice of jurisdiction clauses cease to be interpreted in accordance with EU legislation and EU legislation regarding recognition of judgments will no longer be effective as between the UK and EU jurisdictions' courts	Limited impact in relation to choice of law if UK courts follow historic approach. Uncertainty as to whether contractual choices of jurisdiction will be upheld by EU jurisdictions' courts and judgments will be recognised between EU and UK courts.	 Banking and Finance

What action can you take now?

How can CMS help?

Consider insertion of Loan Market Association form of bail-in clause into English law governed finance documents when created or amended.

We can assist in drafting the relevant documentation.

Check whether Brexit may give rise to events of default under finance documentation (e.g. material adverse change, financial covenants).

We can advise on the interpretation of relevant clauses and how the commercial implications of Brexit that you have identified may impact on your continued compliance with your contractual obligations.

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Competition

What are the legal issues for the application of competition law in the UK following a Brexit?

Issue	Impact	Areas of law affected
Merger control: EU Merger Regulation will not stop application of UK merger control regime	Increased merger control scrutiny: where EUMR applies to a transaction, the UK regime could also apply in parallel.	 All
Competition rules: scope for duplicative investigations by both CMA and European Commission (current EU law avoids this)	Increased regulatory scrutiny: multiple investigations into same issue where there is an effect of trade in the UK and the EU.	 All
European Courts jurisprudence falls away, leaving case-law gap on interpretation of UK competition laws	Uncertainty over application of EU competition case law in UK cases.	 All
Potentially reduced jurisdiction of CAT and High Court to accept follow-on damages actions re EU competition decisions	Current favourable jurisdiction for follow-on damages actions could fall away.	 All
State aid restrictions may no longer apply	Potential for more Government support and less scrutiny from the European Commission.	 All

What action can you take now?

The impact of Brexit will depend largely on the terms of the UK's future trading relationship with the EU.

How can CMS help?

CMS experts can advise on the potential models and implications for competition law and its application to your business.

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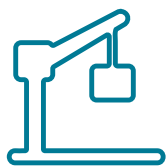
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Construction

What are the legal issues for the Construction sector following a Brexit?

Issue	Impact	Areas of law affected
Reduced opportunities in the construction and engineering sectors	The socio-political, economic and legal challenges ahead herald a period of uncertainty for both the UK and the EU. Uncertainty can only operate to reduce business opportunities.	 Real estate & Construction
	In addition, EU regulations have, to date, generated work in the UK. By way of example, delivering compliance with health and safety law and environmental standards created jobs and work in their own right (for example, investment in water treatment, waste management and clean energy to comply with environmental regulations).	 Health & Safety
	An immediate effect on regulatory law in the UK is highly unlikely; withdrawal negotiations will be painstaking in their desire to ensure that any damage to UK businesses is kept to a minimum. In addition, the UK needs to negotiate access to markets that are subject to EU law.	 Environment
Restrictions on labour migration from EU states into the UK	A fundamental tenet of the 'Leave' campaign is to end the automatic right of EU citizens to work (and live) in the UK. The UK construction sector is particularly reliant on European workers to plug the skills gaps within the British workforce. The threat of tighter migration rules risks putting the flexibility of the UK labour market in jeopardy.	 Real estate & Construction
	Going forward, if demand for labour outstrips supply, the cost of labour will increase. This, in turn, will push up the overall cost of domestic projects. In addition, projects are likely to face further immigration costs should foreign labour be required. In order to fill any gap, labour is likely to be sourced out of the EU (for example, from Asia) – but price will be the key driver, on the basis that immigration issues will be the same (whether from within the EU or from outside it).	 Employment
Supply of goods and materials to the construction sector would be affected by the terms of any new trade agreements which may be established	Clients may face further costs (including tax and compliance costs) associated with importing goods and materials into the UK. Any such costs will increase the overall costs of projects. In leaving the EU, the UK should be free to broker trade agreements with countries both within and outside the EU which, if successfully negotiated, may be advantageous to the UK.	 Real estate & Construction  Tax

Changes to public procurement rules could impact on contractors competing for projects both in the UK and elsewhere in the EU

A change of approach in relation to procurement policy is unlikely to be pursued by UK policy makers in the immediate months and years following the 'out' vote. In fact, in relation to public procurement, the UK's approach has been to go beyond the minimum requirements set by EU law. The legislation will continue to operate until repealed or reformed. In the aftermath of an 'out' decision, reform of procurement law seems unlikely to be top of the government's to do list.

Long term, the UK could seek to vary or even revoke parts of the legislative framework to reduce the costs in complying with the EU rules. This could result in greater flexibility in terms of contracting authorities being able to restrict competition to UK entities. Likewise, however, it could also mean that UK entities which currently bid for contract opportunities outside the EU may find it more difficult to bid for those contracts.



Real estate & Construction



Competition

Conflicts of laws/ Jurisdiction

The EU has in place a comprehensive body of law (which includes the Recast Brussels Regulation and Lugano Convention) that addresses conflicts of laws, jurisdiction and the recognition and enforcement of judgments in civil and commercial matters.

The application of the legislation in the UK, once the UK has formally left the EU, needs to be settled. Until then, there will be uncertainty as to how the issues will be addressed and the uncertainty is likely to lead to disputes.



Real estate & Construction

Joint Ventures

Many domestic infrastructure projects are undertaken by joint ventures comprised of both UK and foreign contractors (from within the EU and outside it).

Issues may arise concerning the future jurisdiction of a JV vehicle and the basis on which the staff of the JV partners might be made available to it (if there are restrictions on the movement of key employees). The uncertainty may result in project delays and unbudgeted costs.



Real estate & Construction



Corporate

Sustainability: differences of approach between the UK and the EU may arise

The UK's exit from the EU may lead to a divergence in approach between the EU and the UK in relation to sustainability goals and related regulatory regimes.

There could be an attempt to dilute EU standards, with a view to lowering the costs of compliance in domestic terms, but in an increasingly globalised world, UK exports of products and services will be required to meet EU and other global standards.



Real estate & Construction



Environment

What action can you take now?

Article 50 of the Lisbon Treaty gives leaving countries a two-year period within which to agree terms with a weighted majority of the remaining EU states. Extending the talks beyond two years requires unanimity.

It is likely, therefore, that the UK will seek informal negotiations with the EU before formally triggering Article 50.

Review existing contractual arrangements to ensure that the company has sufficient flexibility on change in law and termination provisions (or restrictions on termination, as the case may be) to afford protection given its European exposure.

Review the company's contractual arrangements to determine what (if any) amendments need to be made to future agreements to reflect the changes in law that inevitably will follow.

Draft standard clauses to establish governing law in all contracts, to be agreed at an early stage of any negotiations.

How can CMS help?

CMS will be monitoring developments as they unfold and keeping abreast of all changes. As Europe's largest law firm with 39 offices in 18 EU member states, we are best placed to advise our clients.

CMS has particular expertise in carrying out contract reviews: risk identification, profiling and mitigation planning. We bring value by crafting suggestions built around the whole contracting process and employing techniques to alleviate concerns on future negotiations.

CMS can draft these clauses to avoid any potential dispute and unnecessary cost.

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Corporate

What are the legal issues for the Corporate sector following a Brexit?

Issue	Impact	Areas of law affected
Change of law risk; impact on M&A	Increased due diligence, integration scenario planning, and contractual allocation of risk negotiations required.	 All
Due diligence/ integration issues	Cross border European rights (e.g. financial services passports, European patents, free movement of employment across borders) or the UK's existing EU exemptions for trading with Europe may no longer apply.	 All
Loss of transactional tools	A number of cross border M&A mechanisms, e.g. cross border mergers, insurance business transfers, and entity structures, e.g. the Société Européenne and EEIG, rely on European regulations and/or mutual recognition which may no longer apply.	 All
Tax planning and structuring	Common EU rules, e.g. on VAT, may no longer apply.	 All
Merger control filings	The EU operates a 'one-stop-shop' merger control regime for transactions that would otherwise have to be notified for clearance in a number of individual EU or EEA countries. Depending on the nature of the UK's trading relationship with the EU post-Brexit the UK would no longer be a jurisdiction within that one-stop-shop. This would be likely to mean more transactions being notified and investigated by the UK's Competition and Markets Authority (CMA).	 Corporate  Private Equity
Competition compliance and investigations	The substantive rules on anti-trust are likely to remain unchanged post-Brexit, meaning that very few changes would be required to compliance policies. The main impact will be on investigations as Brexit will mean certain institutional and procedural changes to enforcement (e.g. to leniency applications and the conduct of cartel investigations).	 Corporate  Compliance

State aid

State aid rules are intended to ensure a level-playing field for business within the Single Market. EEA countries are bound by the same rules as EU Member States. Brexit may allow the Government greater freedom to subsidise businesses and otherwise award 'aid' measures if it were able to negotiate not to be bound by them when agreeing a new trading relationship with the EU. However, such an outcome may be difficult to achieve.



Corporate



Energy

What action can you take now?

Identification of impact issues particularly pertinent to your business and activities

How can CMS help?

- Join initial brainstorming meetings to identify key areas of concern
- Assist you in preparing new processes, structures and due diligence and integration models.
- Prepare bespoke legal tools as the path forward becomes clearer.

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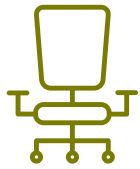


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Employment

What are the legal issues for the application of employment law in the UK following a Brexit?

Issue	Impact	Areas of law affected
Ease of employing workers across borders.	It remains to be seen whether, following Brexit, free movement of workers between the existing EU and EEA states will continue. If not work permits will ordinarily be required.	 All
Working hours.	The UK has traditionally been opposed to the 48 hour working week. In the UK it is subject to individual opt-out which an employee can withdraw at any time without adverse consequence. It is possible that the 48 hour working week will be scrapped or amended.	 All
Business transfers.	The long established Transfer of Undertakings (Protection of Employment) Regulations enshrine the EU Acquired Rights Directive. They protect employees on any business transfer. The current regulations 'gold plate' the EU directive with express provisions dealing with service provision changes. Many states outside the EU have similar laws and it may be inherently unlikely there will be any major change following Brexit. The limitation on harmonising terms and conditions of employment post transfer might go.	 All
Removal or amendment to bonus cap and other CRD requirements.	The UK would have a free hand on bonus caps if the Capital Requirements Directive no longer applies. It can be anticipated that CRD requirements in particular (and many other employment measures) would have to remain in place as an EU imposed price for continued access to the single market. The UK has been reluctant to cap remuneration particularly in the finance sector.	 All
Collective redundancy consultation.	Collective redundancy consultation could be reduced or scrapped. But it has become less onerous since the maximum period was reduced from 90 to 45 days in 2013 and it may be doubtful as to whether this would be high on the priority list of any conservative administration free from EU constraints.	 All

Discrimination.

Uncapped discrimination was as the result of a ECJ decision in 1993. Originally UK law had a low cap. The Beecroft report of 2011 commissioned by the then coalition government recommended a cap on discrimination claims. It is inconceivable that discrimination laws would be repealed wholesale but a cap on compensation could be reintroduced.



All

Accrual of holiday on maternity leave or whilst sick during booked.

Controversial ECJ decisions have established the right to accrue holiday whilst on maternity leave and that time spent on holiday sick should not count towards annual holiday allowance. There would be scope to reverse both outside the EU.



All

Agency workers.

Regulations protecting agency workers and notably establishing equal pay rights subject to a twelve week qualifying service could go.



All

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Energy

What are the legal issues for the Energy sector following a Brexit?

Issue	Impact	Areas of law affected
Potential need to follow energy policy without being able to influence its drafting.	<p>It is likely to be difficult for the UK to have vastly different policies than the rest of Europe on key global issues, such as decarbonisation targets and cross border energy distribution and pipelines, given its geographic proximity to Europe and the need to comply with European standards in order to maintain trade relationships.</p> <p>Potentially more pressure on bottom lines due to increases in EU regulation but without a direct ability to influence decisions at the EU level given the UK's loss of direct political input.</p> <p>UK energy policy is generally ahead of the curve when compared to the rest of the EU.</p>	 Energy  Environment
Conflict of laws/ divergence in policy	<p>UK and EU policy begins to divert from each other (e.g. employee protection, TUPE, anti-bribery and corruption) and leads to differences in contractual policies and difficulties in crossover areas.</p> <p>Given the pressures of a new low oil price environment which is likely to persist for some time, the additional cost pressure of compliance with foreign laws could further squeeze out European investment in UK industry and in particular the North Sea oil and gas industry. Given the number of European players on the UKCS, this may affect companies' willingness to invest in the UK.</p>	 Energy  Employment
Regulation of interconnected markets	<p>Gas markets particularly require continuing regulation.</p> <p>Muddying of the waters will occur if there is doubt as to which regulations (EU or UK) influence, take precedence and/or have jurisdiction.</p>	 Energy
Conduct of cross-border transactions between interconnected markets	<p>UK and EU standards used for same transaction.</p> <p>Adds layer of time, complexity and potential dispute as to the regulations to be used.</p>	 Corporate

Energy security

UK and EU Energy Union priorities may differ.



Fully functioning joint ventures (merger control)

New joint ventures will be more complicated if the policies divert and there is no clarity of jurisdiction.



M&A

Conflict of competition rules (similar to item 2 above) increases complexity, time and cost in M&A transactions. Euro countries reticent of engaging with UK countries as a result.



Energy subsidies

Important income stream in UK energy grants from EU (e.g. power, renewables, solar, onshore wind, hydropower) may be lost with Brexit.

State subsidy rates will also need to be reconsidered.



Energy project finance

Access to project finance funding for the UK Energy sector may be affected as European financial institutions currently lending into UK projects reassess their lending criteria for providing long term debt finance to UK projects. The European Investment Bank's role in funding major projects across the UK (with funds from the European Union) may also be impacted. Any drop in the UK Govt's ratings will add to the list of issues constraining the availability of debt funding to UK projects – in particular where there are elements of Govt support or subsidies that apply to projects.



Governing law/ jurisdiction

Brexit may remove clarity over the jurisdiction used to settle disputes and result in further negotiations between parties to decide on the governing law of the relevant agreements, incurring additional costs.



Increase in freedom to enter into international agreements

Brexit will allow Britain to find its own way in international trade (e.g. China and India) by negotiating treaties without the burden of the EU. It presents an opportunity for a leaner business model and less regulation.

Scottish independence discussions will resume as the SNP have outlined its clear desire to remain in the EU

The turbulence seen in 2014 would return as the debate is reignited. North Sea oil becomes part of the conversation and raises uncertainty in the region, leading to less investment.

What action can you take now?

How can CMS help?

Revisit standard form contracts to ensure companies have sufficient flexibility on change in law provisions and termination provisions (or restrictions on termination as the case may be) that reflect the company's European exposure.	Contract review for risk identification, profiling and mitigation planning. Suggestions for contracting process and techniques to alleviate concerns on future negotiations.
Review contracting strategy to limit exposure to Brexit. Review potential counterparties' nature and duration of upcoming deals in relation to the European element of the deal to ensure a Brexit is neutral to its terms.	CMS can assist with DD on counterparties to ascertain the European elements of such parties are fully understood and advise on the best contracting strategy to engage with that party to remove or minimise adverse consequences of Brexit on the relationship.
Have clear guidelines for employees as to what effect Brexit may mean for companies (good and bad).	CMS can prepare toolkits for companies' management to assist with educating employees as to any new requirements or policies, etc.
Draft standard clauses to establish governing law in all contracts, to be agreed at an early stage of any negotiations.	CMS can draft these clauses to avoid any potential dispute and unnecessary cost.
Look into international markets with potential high growth as areas of investment, establish a presence in these markets and build up local contacts and expertise.	Provide local knowledge through overseas offices and strong local relationships.

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Financial Services

What are the legal issues for the financial services sector following a Brexit?

Issue	Impact	Areas of law affected
FCA/PRA authorisations ceasing to be valid in EU/EEA countries	Brexit (without EEA membership) would be likely to mean a loss of mutual recognition/passporting for UK financial institutions, for example, when dealing with EU/EEA clients/counterparties on a cross border basis or via local branches. Groups would need to consider regulatory/corporate/capital restructuring, for example, establishing/using subsidiaries incorporated in EU/EEA states, obtaining additional authorisation in EU/EEA countries, changing business/transaction flows and capital structures.	 Financial Services  Banking  Funds  Insurance  Corporate
EU/EEA authorisations ceasing to be valid in the UK	Brexit (without EEA membership) would be likely to mean a loss of mutual recognition/passporting for EU/EEA financial institutions, for example, when dealing with UK clients/counterparties on a cross border basis or via local branches. Impacted groups would need to consider regulatory/corporate/capital restructuring, for example, establishing/using subsidiaries incorporated in the UK, obtaining UK authorisation and changing business/transaction flows and capital structures.	 Banking  Financial Services  Insurance  Funds
FCA authorisation of funds and managers ceasing to be valid in EU/EEA countries	A loss of mutual recognition/passporting would impact UK incorporated UCITS/AIFMD funds and fund managers in relation to EU/EEA business/sales. Retail funds would lose their UCITS status. Loss of the UCITS badge may also impact sales outside the EU/EEA and perhaps even in the UK. Unless restricted to domestic business, funds would need to re-domicile to retain the UCITS/AIFMD status. Alternatively funds could seek to deal with the local marketing regime in relevant EU/EEA countries (although the position would change if the AIFMD third country regime comes into effect).	 Financial Services  Corporate  Funds

Status of EU/EEA funds and managers in the UK

As above in reverse (but the UK might not wish to restrict UK investors' access to UCITS and AIFs?).



Financial Services



Corporate



Funds

Legal and regulatory uncertainty – commercial, economic, financial and political uncertainty

The FPC found Brexit to be the most significant near-term domestic risk to financial stability, with uncertainty continuing after a vote to leave. Firms would face a volatile period. The legal system would face similar challenges to stability and firms/UK lawyers would need to adapt to greater uncertainty and change. Uncertainty about the legal basis for FI regulation and the responsibilities of institutions will hinder the development of regulatory policy/change and may even adversely impact supervision



Banking



Financial Services



Insurance



Funds

New freedom for the UK to adapt or revoke inappropriate EU regulatory requirements

Brexit (without EEA membership) would remove the legal obligation for the UK to implement EU FS regulation. Firms may wish to lobby for changes where current EU derived requirements are burdensome, sub-optimum for the UK market or lack domestic support from regulators. One example might be the EU bonus cap rules. The UK's freedom may well be tempered, however, by the desire to achieve 'equivalence' recognition from the EU in order to take advantage of the third country regimes under EU FS legislation.



Banking



Financial Services



Insurance



Funds

Transactions and other contracts

The Brexit changes to the current legal regime will impact the terms and effect of contracts and transactions. There will be a broadly based review of standard documentation – both precedents and industry standards such as ISDAs. Firms and lawyers will need to be alert when dealing with contracts and transactions whilst uncertainty persists.



Banking



Financial Services



Insurance



Funds

Loss of UK's leading role in formation of regulatory policy in EU

The UK has been highly influential in the development of the EU rules for financial institutions. After a 'vote to leave' the UK's voice would diminish and the UK would probably cease to have any real policy involvement following Brexit. Lobbying in relation to EU rules would have to be routed via EU/EEA firms/bodies and would no longer take account of UK specific issues.



Banking



Financial Services



Insurance



Funds

Increased risk of EU roles attacking the City/UK

The City has faced various challenges from EU proposals. The UK has sought to rely upon its rights as an EU state (e.g. under the EU treaties) and has obtained further protection under the new UK/EU settlement. After Brexit the EU will be free to promote the interests of EU states/financial centres free from UK challenge under these protections.



Banking



Financial Services



What action can you take now?

How can CMS help?

<p>Brexit planning – group/regulatory structure.</p> <p>Map EU/EEA business/operations. Identify other areas impacted by Brexit – e.g. cross-border outsourcing/ services. Consider options – at least in outline - for post-Brexit structure/reorganisation. Identify/plan for/ investigate key issues (e.g. authorisation, capital, employment, intra-group/shared services and tax) to evaluate optimum structure and necessary reorganisation to implement.</p>	<p>Review and advise on optimum structures, reorganisation mechanics – including pan-European advice from CMS offices across EU.</p> <p>Review planning assumptions and conclusions.</p> <p>Review mapping of current structures.</p> <p>Advice on any of the key legal issues mentioned.</p>
<p>Brexit planning – internal briefing.</p> <p>Ensure necessary briefing internally on Brexit and raise awareness of above issues/impacts – from Board level to business support/operations and business units. Establish internal working group structure.</p>	<p>Provide in-house Brexit training/presentation.</p> <p>Lead in-house Brexit brain-storming.</p> <p>Review in-house briefing.</p>
<p>Brexit planning – legal.</p> <p>See above. General counsel to ‘run slide-rule’ over Brexit legal issues/impact and how in-house team/external counsel would handle these.</p>	<p>Review plans and assumptions.</p> <p>Brainstorm impact/issues.</p> <p>Advise on relevant legal issues.</p>
<p>Brexit planning - public affairs/governmental relations.</p> <p>See above. Prepare list of areas/issues for lobbying post vote to leave.</p>	<p>Brainstorm/review issues.</p>
<p>Current contracts and transactions.</p> <p>Review current contract negotiations and transactions – closing pre and post 23/6/16. Assess Brexit impact on contract/deal terms</p>	<p>Advise on contractual issues – Brexit impact.</p> <p>Review internal policy on Brexit impacts re contract terms.</p>

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Health & Safety

What are the legal issues for the Health & Safety sector following a Brexit?

Issue	Impact	Areas of law affected	
Exit may lead to differences of approach between the UK and the EU concerning safety at work	Any exit from the EU may lead to a divergence in approach between the EU and the UK to Health & Safety goals and to Health & Safety regulations in the workplace. This could reduce costs incurred as a result of having to comply with EU regulations. Likewise, however, divergence would add to administrative costs and the UK could lose the standardisation of Health & Safety law that large international brands seek.	 Health & Safety	 Insurance
		 Real estate & Construction	 Environment
Changes to the Health & Safety regulations could impact on contractors, visitors and the general public	The UK could have a greater ability to vary or revoke the regulations because it is no longer bound to comply with EU regulations. This could mean greater flexibility in determining the extent to which Health & Safety at work legislation is applicable.	 Health & Safety	 Insurance
		 Real estate & Construction	
Conflicts of laws/ Jurisdiction	Currently, there is EU legislation which addresses conflicts of laws and jurisdictions within the EU. This would no longer apply and there is uncertainty as to how this would be addressed. This is likely to lead to further disputes.	 Health & Safety	 Competition
Reduction in compliance measures	Any exit from the EU may lead to loss of jobs as the compliance with Health & Safety law and environmental standards has created jobs and works in its own right.	 Health & Safety	 Employment

The UK would regain full control of Health & Safety law

The UK efforts on tackling gold-plating would be furthered as the UK would be able to address the underlying EU legislation. However, it is likely that at least some of the EU regulations have improved a lot of the British workforce and potentially even lead to greater safety in areas such as patient care, public transport etc. Any attempt to abolish these rules would result in anguished campaigns by trade union leaders, charities and lobbying groups to retain them.



Health & Safety



Funds

The UK has already ceded authority to the Treaty of the Functioning of the European Union (TFEU)

Under the TFEU, the UK ceded authority to the EU regarding the working environment to protect the Health and Safety of workers. This authority could be difficult to reverse, and the UK workforce now expects certain rights and standards in line with the EU regarding working environment. With Brexit, occupational safety could be under threat of being weakened.



Health & Safety



Insurance



Environment

Exit may take the UK away from EU consolidation of regulation

The EU has been working towards deregulation and consolidation of regulations under the Regulatory Fitness and Performance Programme, which replaced 6,100 acts between 2006 and 2015 and withdrew 53 legislative proposals in 2014. Under the Transatlantic Trade and Investment Partnership (TTIP) between the EU and the USA, harmonisation of regulation is being worked towards with more revocations in sight. With Brexit, the UK may retain many regulations that are later consolidated in Europe.



Health & Safety



Corporate



Real estate & Construction

The UK would miss out in EU future efforts against occupational illness

Currently, there are efforts in the EU to produce an enhanced package of measures to tackle the ever-growing burden of occupational illness felt in both the UK and the EU. With Brexit, the UK may not develop these measures at the same pace or to the same extent as the EU leading to disparities amongst the workers.



Health & Safety



Insurance



Employment

What action can you take now?

Review all Health & Safety policies to ensure companies have sufficient flexibility on change in law and compliancy regulations.

How can CMS help?

Policy review for risk identification, profiling and mitigation planning.

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Infrastructure and Project Finance

What are the legal issues for Infrastructure and Project Finance following a Brexit?

Issue	Impact	Areas of law affected
Funding - Brexit might affect the availability and price of funding to infrastructure projects	<p>New regulations may prevent / make it more difficult for the public sector and/or investors seeking to undertake infrastructure projects to access EU funds and grants. This may affect the feasibility and/or viability of infrastructure projects.</p> <p>Brexit will change the status of the UK and UK projects in relation to EIB funding. If the UK sits outside the EEA and EFTA, EIB funding will not be available for projects. Given that the cost of EIB funding generally lower than that provided by commercial lenders – and that the EIB also provides certain financial products and guarantees that are not available from commercial lenders – this will impact on the amount of debt available to fund infrastructure projects and the overall pricing of that debt.</p> <p>Depending on negotiations the UK could become a part of the EFTA, where the EIB offers loans for certain project initiatives. Any project initiatives would have to meet the same eligibility criteria, such as environmental and procurement requirements, and follow the same procedures as those within the EU and any changes to UK legislation may make it more difficult to meet the EIB's eligibility criteria.</p>	 <p>IPF</p>
Procurement – Brexit would allow certain flexibility in relation to UK procurement law	<p>Brexit will allow the UK to develop and/or amend existing procurement rules to allow for additional flexibility (as existing legislation is based on EU Directives).</p> <p>Changes to procurement legislation could allow the implementation of different procurement approaches more suited to different types of infrastructure project.</p> <p>Any changes to procurement would take time and potentially introduce uncertainty and this may affect the pipeline of infrastructure projects or the timetable for implementation of infrastructure projects.</p>	 <p>IPF</p>  <p>Procurement</p>

Environmental regulation – Brexit would allow flexibility in relation to UK environmental law

Brexit will allow the UK to develop and/or amend existing environmental legislation to allow for different policy objectives or flexibility (as existing legislation is based on EU Directives).

A number of infrastructure projects have been instigated to reflect EU policy requirements as instigated through EU legislation (e.g. waste treatment plants or recycling initiatives). Any move by the UK away from EU environmental regulation may result in an impact on the viability of both existing and planned projects.

Any changes to environmental legislation would take time and potentially introduce uncertainty and this may affect the pipeline of infrastructure projects or the timetable for implementation of infrastructure projects.

Commercial lenders lending to projects that are funded by debt (rather than by the public sector) would likely still wish to implement the Equator Principles and therefore some environmental analysis would always be required for infrastructure projects.



IPF



Environment

Restriction on movement of goods and services – Brexit may result in the loss of access to freedom of movement of goods and services and/or the imposition of restrictions under UK legislation

Brexit will allow the UK to develop and/or amend existing legislation in relation to control of the movement of goods and services.

Any restrictions on the movement of labour, goods and services into the UK (e.g. a restriction on working permits or immigration) may result in an increase of costs of performing infrastructure projects in the UK.

Any restrictions on the movement of labour, goods and services from the UK into Europe (e.g. by requiring permits or the introduction of import tariffs) may also impact on the ability of UK companies to compete for infrastructure projects in the EU.



IPF

Competition and State Aid

Brexit will allow the UK to develop and/or amend existing legislation in relation to competition and state aid.

Certain deregulation of state aid or competition restrictions may provide opportunities for new or different project structures in the infrastructure sector.



IPF

Legislative and regulatory uncertainty – Brexit will raise questions about future legislation and regulation to be applied to infrastructure projects

Brexit is likely to result in a prolonged period of negotiation with the EU in relation to the future relationship between the UK and the EU member states (and potentially members of the EEA and EFTA). General legislative and regulatory uncertainty tends to impact on the ability and desire of both public sector and private sector participants in the infrastructure projects to promote new projects.



IPF

Change in Law provisions – most infrastructure projects contain contractual provisions outlining mechanics for change in the contract following changes in law

In the event that there is significant legislative change as a result of Brexit, there will be a need to address any consequences of changes in law in infrastructure contracts.

The ability to obtain compensation or relief in respect of changes in law is often restricted to changes that either have a capital cost associated with them or which are discriminatory to a particular project or sector. Brexit would be 'generally' applicable and therefore any impact of changes in law (in particular, any which have a cost impact on the providers of infrastructure projects) is to be the risk of the infrastructure provider.



IPF

Infrastructure planning – The UK's role in pan-European infrastructure planning (e.g. the TEN-T network)

It is unclear how Brexit will impact on the UK's role in planning infrastructure (including energy and transport infrastructure) throughout Europe.



IPF

Balance sheet treatment of projects – application of ESA and the accounting requirements to achieve off-balance sheet treatment of projects impacts on the structure and risk allocation provisions in infrastructure contracts

Brexit will allow the UK to dis-apply the accountancy rules associated with membership of the EU (ESA). The application of ESA95 has had a significant impact on the balance sheet treatment of infrastructure projects and resulted in changes being required to the structure of infrastructure projects. Changes to accounting requirements may allow the UK to develop different contractual models for the implementation of infrastructure projects.

Note that ESA rules are however based on UN SNA rules and in implementing any changes the UK may be required to consider these as part of other international commitments or as part of any negotiation of future trading arrangements.



IPF

Infrastructure funds and investors – implications of the UK no longer being an EU member

A number of infrastructure investment funds have been set up with rules limiting the scope and geographical spread of investment. If any fund has a restriction that restricts investment to projects in the EU, any consequences for existing projects in the UK or future investment strategy will need to be considered.



IPF

What action can you take now?

How can CMS help?

Existing infrastructure projects: Companies can review contracts to understand the change in law mechanics and any impact that changes in law may have on their existing contracts.

CMS can assist with review of change in law provisions in contracts or with developing change in law mechanics for contracts currently under negotiation to reflect any potential changes arising from Brexit.

Future infrastructure projects: It is difficult to assess the impact of Brexit on future infrastructure projects in the UK as this will depend on the nature and scale of any legislative changes introduced as a result of Brexit.

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Lifesciences

What are the legal issues for the lifesciences sector following a Brexit?

Issue	Impact	Areas of law affected
Potential significant reduction in funding for UK academic research stemming from loss of/reduced access to EU funding programmes.	This could lead to a reduced product research and development base in the UK, as there will be less opportunity for collaboration with, and technology transfer from, universities/research institutions. It may also lead to fewer trained research scientists being available for lifesciences companies to recruit. Overall, this could lead to the UK becoming a less appealing location for lifesciences companies to site their R&D operations.	 <p>Lifesciences</p>
The UK will no longer have access to the EEA centralised clinical trial authorisation portal and database for medicinal products (which may also in future apply to the approval process for medical device clinical investigations).	Opening UK pharmaceutical/medical devices clinical trial sites in the UK will entail incurring the cost of applying for authorisation of a clinical trial for the UK only. Trial sponsors will lose the time and cost-efficiencies of a single application filing process covering the UK and the rest of the EEA.	 <p>Lifesciences</p>
Medicines authorised through the EMA-operated centralised procedure would no longer be authorised in the UK, as currently marketing authorisations for these drugs are provided for by an EU Regulation having direct effect.	<p>If no mutual recognition agreement is in place post-Brexit for the centralised procedure, the UK would likely have to act unilaterally to recognise EU-authorised drugs; otherwise there is the potential for UK medicines shortages. This would at least in the first instance have to take the form of “grandfathering”, i.e. any EMA authorisation granted before Brexit would continue to be recognised in the UK.</p> <p>This could also be extended to include unilateral recognition of authorisations granted by the EMA in future.</p> <p>Companies may need to consider whether it is economically viable to apply for a UK marketing authorisation, considering the additional cost and the relatively smaller market that the UK presents. Companies may also choose to delay the launch of a product in the UK to see how successful it is in larger markets first, thereby delaying UK patients’ access to innovative therapies.</p>	 <p>Lifesciences</p>

The UK's nationally granted marketing authorisations for medicines would no longer be within the scope of the EU mutual recognition procedures, whereby a single member state's medicines authority assesses a marketing authorisation application for compliance with the legal requirements. The report is then (usually) adopted by other concerned member states.

Medicines previously authorised through these procedures will retain valid UK marketing authorisations in their own right. However, this may result in fewer marketing authorisation applications in the future, as pharmaceutical companies take advantage of the time and cost efficiencies associated with the EU mutual recognition procedures and may defer applications for standalone UK authorisations.



Companies must be established in the EEA in order to hold a medicines marketing authorisation in the EEA.

If the current marketing authorisation holder is a UK company that intends to market medicines in other EEA countries, it would need to establish (or else equip entities within its group) in EEA member states to operate as marketing authorisation holders. These companies would have to re-apply for EU marketing authorisations for the products.



Medicines manufacturers would need to file adverse safety reports in relation to their products both in the UK and in the EU.

There would be additional cost and resource required to meet two sets of requirements, particularly if the UK regulatory requirements diverge from those in the EEA.



Active substances for medicines can only be imported into the EEA if they have been manufactured in accordance with Good Manufacturing Practice ("GMP") standards at least equivalent to those applicable in the EU.

The UK GMP standards would therefore need to be equivalent to the EU's to allow UK active substance manufacturers to export to the EEA, unless the UK is whitelisted by the European Commission (which the UK would need to apply for). Provided that UK legislation remains equivalent to EU legislation after Brexit it is unlikely to be difficult for the UK to obtain a whitelisting.



EU law lays down specific packaging and labelling requirements that must be complied with when selling medicines in the EEA.

Packaging and labelling requirements (including new safety features and anti-tampering measures brought in under the EU Falsified Medicines Directive) must be complied with by manufacturers who are exporting to the EEA from third countries. For UK companies that do not export to the EEA, there may be less stringent packaging and labelling requirements if the government does de-regulate post-Brexit. However, patient safety measures do not appear to be a very obvious target for de-regulation.



The UK will no longer have influence over EU medical devices legislation.

The UK would no longer need to follow the EU medical devices legislation, including the new Medical Devices and In Vitro Diagnostics Regulations. This would potentially mean manufacturers selling devices solely in the UK could avoid certain provisions that are contained in the new Regulations. UK manufacturers selling solely in the UK might benefit from this but those manufacturers exporting to the EEA (or contract manufacturing for other sellers in the EEA) would still have to abide by the requirements of the EU legislation and would therefore have to cover the cost of compliance with an additional regulatory regime.

With the texts of the Medical Devices and In Vitro Diagnostics Regulations still being finalised, the UK would lose influence over the process to finalise these texts and the associated implementing and delegated acts. UK manufacturers exporting to the EEA could be adversely affected by this loss of influence.



Medical device manufacturers who are not established in the EEA must have an authorised representative.

If a UK company is not also established in the EEA, then it will need to have (and fund) a European authorised representative. The Council text of the proposed new Medical Devices Regulation places liability provisions on authorised representatives. Appointing an authorised representative could become expensive.



UK will not be covered by EU Unitary Patent.

The EU is close to establishing the Unitary Patent that will give patent protection across the whole of the EU. This new system will simplify patent challenges and litigation across Europe and reduce legal costs due to there then only being the need for a single set of proceedings for the whole of the EU. Unitary Patents could still be obtained for UK lifesciences companies; however separate UK patents would need to be obtained for protection in the UK. Separate UK proceedings for any disputes would be needed.



Jurisdiction/ governing law applicable to contracts.

Currently, EU legislation gives clarity over recognition of choice of law and jurisdiction provisions in contracts.



Territorial application of contracts.

Contracts that are made by reference to a specified territorial area, such as patent licences and distribution agreements, may no longer cover the UK, if made by reference to the "EU".



commercial contracts



Disputes

What action can you take now?

In respect of any collaboration agreements with research institutions that are dependent on, or heavily reliant on, EU funding for the research, companies should consider including contractual clauses covering what is to happen in the event of a Brexit.

Those responsible for organising clinical trial programmes should be made aware of the potential cost and delay implications of a Brexit.

Companies should review all contracts which reference EU legislation and/or which pre-suppose that the UK will remain an EU member state to assess the impact of a Brexit on these contracts and the parties' contractual arrangements for regulatory compliance.

How can CMS help?

CMS is able to advise on the drafting and negotiation of clauses that can best protect your business in the eventuality of a Brexit.

CMS can advise on how a Brexit may affect clinical trial legislation and what contractual and organisational protections should be put in place to help alleviate any adverse effect a Brexit may have on your business.

CMS is able to advise on the drafting and negotiation of clauses that can best protect your business in the eventuality of a Brexit.

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Pensions

What are the legal issues for the application of pensions law in the UK following a Brexit?

Issue	Impact	Areas of law affected	
Scheme funding requirements	Brexit will allow the review of scheme funding requirements derived from the EU Pensions Directive, although wholesale change to the existing scheme specific, prudence based approach is unlikely. However, Brexit will remove the potential for anticipated longer term changes to move to a far more onerous funding basis (the so-called 'holistic balance sheet').		Pensions
Pensions aspects of TUPE	Under Court of Justice case law, pension rights on redundancy or early retirement can transfer, whilst other pension rights do not. This currently complicates business sales and the Government would be free to streamline its approach e.g. to restore a broad exemption from TUPE for pension rights.		Pensions
Pensions aspects of equality legislation	Discrimination legislation will remain, but it will be possible to expand existing exemptions in key areas such as age discrimination, which has never sat easily with the concept of a pension scheme. There will be scope to review the law on sex discrimination as it relates to issues such as scheme calculation factors or guaranteed minimum pensions, both areas in which application of EU law has led to difficulties in practice.		Pensions
Investment	Regulations contain restrictions on pension scheme investment derived from the Pensions Directive. These could be amended but seem unlikely to be the subject of fundamental change. In addition, the European Markets Infrastructure Regulation which has implications for trustees purchasing derivatives will no longer be directly relevant.		Pensions
Data Protection	Existing data protection legislation is unlikely to change but changes in a new European Data Protection Regulation due to come into force in May 2018 may not affect the UK. This will mean that trustees will not have to revisit existing data protection consents.	 Intellectual Property	 Pensions

Cross-border schemes

There are strict funding requirements for schemes which operate across European borders. UK legislation implementing these requirements will need to be amended and it is not clear what will replace it.



Pensions

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Public procurement

What are the legal issues for Public Procurement following a Brexit?

Issue	Impact	Areas of law affected
EU procurement rules may no longer apply	Implementing UK legislation already in place will still exist but may be revised by UK and Scottish Parliaments, though principles around advertising and competing public sector contracts to the market are unlikely to change radically.	 Public procurement
European Courts jurisprudence falls away, leaving case-law gap on interpretation of UK procurement laws	Uncertainty re. application of procurement case law in UK cases and no EU guidance on interpretation.	 Public procurement
UK government has no influence on EU procurement regime and UK companies may not have the same rights as EU companies when tendering for public sector contracts across the EU	UK government may be unable to influence the EU procurement regime and UK companies may find it more difficult to compete for public sector contracts across the EU.	 Public procurement

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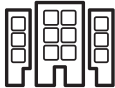


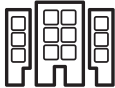

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Real Estate

What are the legal issues for the real estate sector following a Brexit?

Issue	Impact	Areas of law affected
Reduction in tenant demand for commercial real estate	<p>In London, Scotland and several other cities the UK's real estate sector supports the European operations of leading global companies, particularly in the financial services sector. A Brexit could lead these companies to consider re-locating. Real estate investors would have to accept the effect on the value of their investments. Landlords and tenants would have to manage their ongoing liabilities under leases of unwanted office space.</p>	<div>  <p>Real Estate</p> </div> <div>  <p>Funds</p> </div> <div>  <p>Financial Services</p> </div>
Relaxation of public procurement rules	<p>A Brexit might lead to a relaxation in the UK of the procurement rules which have been imposed on development projects involving the public sector. This could either simplify or reduce the cost of the tendering process or, at least, allow greater flexibility – for example allowing variations to development agreements where market conditions change without the need for a retender. Conversely, moving away from the EU framework could allow other barriers to be imposed. For example, it has been suggested that all tenderers for public works' contracts in Scotland need to be paying the 'living wage' instead of the UK minimum wage. This potentially adds to construction cost.</p>	<div>  <p>Real Estate & Construction</p> </div> <div>  <p>Public procurement</p> </div> <div>  <p>Employment</p> </div>
Environmental impact assessments being scaled back	<p>There is unlikely to be wholesale revocation of the UK's own regulations because, for major projects, EIA represents best practice even when a project falls outside the EIA regime, but the process of applying for permission for development could be made quicker, less expensive and generally more flexible with less scope for legal challenge on environmental grounds. Changes could include fewer requirements for assessment for medium sized developments and flexibility on the part of the UK not to adopt some of the changes in the new EIA Directive which Member States have to implement by May 2017.</p>	<div>  <p>Real Estate & Construction</p> </div> <div>  <p>Environment</p> </div>

Disapplication of the European Enforcement Order (EEO) Regulation

Currently EU regulation makes the enforcement of UK Court orders against residents of other EU countries relatively straightforward. This makes real estate investors more relaxed about accepting EU based entities as tenants, as claims for unpaid rent and other liabilities can be relatively easily pursued. On a Brexit the EEO Regulation would cease to apply and a replacement regime would have to be negotiated and put in place. The Lugano Convention to which all pre 2004 EU members including the UK as well as Poland, Iceland, Switzerland and Norway are signatories would continue to apply, but it is a less effective regime.



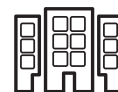
Real Estate & Construction



Insolvency

Disapplication of the AIFMD passporting regime

Alternative investment funds, including real estate funds, benefit to some extent from the passporting regime set up under the EU's Alternative Investment Fund Managers Directive. In theory this allows funds set up in one EU country to be marketed in another without obtaining full regulatory authorisation in that country. This should facilitate a Europe-wide real estate investment market. A Brexit could mean that funds based in other countries are less likely to operate across the border between the UK and EU and could restrict the overall flow of investment across borders.



Real Estate & Construction



Funds



Financial Services

Disapplication of the EC Regulation on insolvency proceedings

The Insolvency Regulation uses the concept of an entity's 'Centre of Main Interests' (COMI) to determine which member state of the EU (other than Denmark) takes precedence if competing insolvency procedures are commenced in different member states and to ensure recognition and co-operation for those proceedings. This allows entities to 'forum shop' for the most favourable jurisdiction in which to commence an insolvency procedure. UK registered companies can be wound up in other European countries if they move their COMI. There is no obligation to register a change in the location of the COMI at the UK's Companies House. This can put landlords at a disadvantage when pursuing guarantors of tenant liabilities. This issue could disappear.



Real Estate & Construction



Insolvency

What action can you take now?

Brexit planning – internal briefing.

Ensure necessary briefing internally on Brexit and raise awareness of the above issues/impacts – at both board level and in the business generally.

Brexit planning – public affairs/governmental relations.

Current asset management issues.

Review status of real estate portfolios and development projects to assess likelihood of future Brexit impacts and risks.

How can CMS help?

Provide in-house Brexit training/presentation.

Lead in-house Brexit brain-storming.

Review in-house briefings.

Brainstorm/review issues.

Advise on legal risks generally and in particular contexts.

Review internal strategies as to potential Brexit impacts.

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Taxation

What are the legal issues for taxation following a Brexit?

Issue	Impact	Areas of law affected
The potential abolition, replacement or modification of VAT	While direct taxation remains the prerogative of national legislatures, VAT is imposed by EU Directive. VAT raised around a fifth of national tax revenue in 2013/2014 so it is unlikely such a rich source of revenue would be abolished following a Brexit. Nevertheless, it could be replaced by a simplified sales tax. This would in turn result in incompatibility between UK and EU law. Whenever goods crossed the UK-EU frontier, VAT would have to be adjusted for accordingly. This may result in additional bureaucracy and could affect a company's cash flow.	 Taxation
The implementation of customs duties on UK goods exported to the EU	On leaving the Customs Union, the UK would no longer benefit from the abolition of customs duties and procedures within the EU. EU countries would be free to erect trade barriers and create tariffs affecting the competitiveness of UK goods in the EU market. However, the UK would also be able to erect such trade barriers and tariffs, protecting UK industries from being placed at a competitive disadvantage to EU counterparts. The lack of a clear, coherent consensus as to the nature of the UK's trade agreements post-Brexit necessarily makes the position highly speculative.	 Taxation
Removal of the Parent-Subsidiary Directive	Companies with a UK parent company and EU subsidiaries, or an EU parent company with UK subsidiaries may now become subject to withholding tax on individual payments. Any profits earned by a subsidiary in a low tax jurisdiction would be taxed at the rate of the parent company's jurisdiction. However, the UK currently has bilateral tax agreements concerning double taxation with many existing EU countries. The impact of the removal of the Parent-Subsidiary Directive may be limited.	 Taxation  Corporate
Removal of the Interest and Royalty Directive	The Directive, in its current state, allows interest and dividends to be paid to UK-based companies, free from withholding taxes. Once again, the UK has bilateral tax agreements with many EU countries, reducing withholding taxes to 0%. However, it does not have existing agreements allowing 0% withholding taxes with all countries. For example, the treaty with Germany does not provide for 0% withholding tax in these circumstances.	 Taxation

The removal of the Capital Duties Directive

The domestic UK 1.5% SDRT charge on issues of shares etc. to depositary receipts is in many cases disapplied by a ruling of the European Court pursuant to the Capital Duties Directive. It is likely, in the short-term at least, the 1.5% SDRT would once again come into force.



Taxation

The impact on the UK economy and the next Budget

Arguably the greatest impact on UK Taxation from Brexit is the impact Brexit would have on the UK economy and the next Budget. The Chancellor has already warned of a new wave of austerity to counter-balance the widely-predicted disruption caused to the UK economy by Brexit. The Chancellor has predicted a 2% rise in the base rate of income tax to 22%, a 3% rise in the higher rate of income tax to 43% and a 5% rise in inheritance tax to 45%, as well as an increase in alcohol and petrol duties by 5%. Whether this is political bluster or a genuine post-Brexit prediction is obviously highly debatable.



Taxation



Corporate

What action can you take now?

How can CMS help?

Brexit planning

Consider the impact of Brexit on existing organisational structure.

Corporate structure review and providing advice on any material risks identified.

Review standard form contracts to ensure that companies have sufficient flexibility on change in law and termination provisions.

Contract review for risk identification, profiling and mitigation planning.

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